



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: March 31, 2016

CBCA 2294

AMERICOM GOVERNMENT SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Brendan M. Lill of Hogan Lovells US LLP, Washington, DC, counsel for Appellant.

Jennifer L. Howard, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **POLLACK**, **GOODMAN**, and **SHERIDAN**.

POLLACK, Board Judge.

This appeal involves the claim of Americom Government Services, Inc. (AGS or appellant) against the General Services Administration (GSA) for costs of providing Host Nation satellite licenses and bandwidth services (HNAs) for use by the United States Forces Korea (USFK). For purposes of this decision we will use the identification HNAs to collectively refer to both the license and frequency segments of the services. Where we need to differentiate, we will specifically reference one or the other. Appellant seeks recovery under indefinite delivery indefinite quantity (IDIQ) contract GS-35F-0301N (contract) and task order number 9T3APN018 (task order), both of which were between GSA and AGS. On June 22, 2005, appellant invoiced GSA for the HNAs in the amount of \$569,793.53, plus an additional \$10,000 for training and translation services. GSA approved the payment and paid appellant the full invoice. After payment of the invoice, GSA realized the HNAs were not

covered under the task order or any other contract instrument. GSA then sought to recoup the money by deducting payments otherwise due appellant on other completed obligations. GSA also returned \$597,566.08 as unobligated funds to the Army. GSA closed out the task order in May 2006.

While GSA does not deny that AGS provided HNAs and associated frequency services, it denies AGS's right to payment and questions the number of HNAs provided. GSA contends that because the funds were not paid under a valid contract instrument and through the authority of a contracting official, the payment was by mistake and appellant must bear the consequences. GSA also raises defenses as to violating the cost ceiling on the contract. Appellant initially claimed that the HNAs were covered under the task order, and that if not covered, then there was an implied-in-fact contract. Finally, appellant ultimately asserted that it was entitled to compensation under the theory of ratification.

On August 13, 2014, the Board ruled on cross-motions for summary relief in *Americom Government Services, Inc. v. General Services Administration*, CBCA 2294, 14-1 BCA ¶ 35,687. We ruled that as a matter of law, there was no express contract; determined that the task order award was for no more than thirteen HNAs; and determined that the task order did not cover the added HNAs claimed. At the time of the motions, the only identified GSA official to have a connection to the purchase of the HNAs was Ms. Elizabeth Bigger, who approved the payment invoice for the work. We concluded that her actions as to the approval of the invoice were not enough to create an implied-in-fact contract. We left unresolved the matter of ratification, emphasizing that the record needed to be better developed before we could render a decision.

On July 22 and 23, 2015, we held a hearing focusing on the issue of institutional ratification. Significant evidence was presented at the hearing that had not been presented previously, much of which is contained in this decision.

Witnesses

Most of the testimony was by telephone, with a number of key witnesses being overseas. The following witnesses testified:

Roy Flores, an official with AGS at the time, testified as to his involvement with the initial order for thirteen HNAs and as to AGS providing the HNAs, which are the subject of the claim, to USFK. Appellant also called Don Rew, a principal of Integrated Satellite Solutions (ISS), the Korean firm that provided the HNAs under subcontract to AGS. He discussed interactions with USFK and AGS, the initiation of the purchase, what was delivered, and when.

GSA called Elizabeth Bigger, the GSA official who approved the invoice/voucher for the HNAs in dispute. She testified as to that approval, her role in procurement for GSA, and the operation of the GSA procurement office. GSA also called Mr. Joseph Smithey, the contracting officer (CO) from 2005 into 2008. He was not the CO at the time of award, but was at the time of the invoice, at the time of the discovery of the mistaken payment, and at the time of the return of money to USFK. During the motions proceeding, he was not a focus of either party. At the hearing, he addressed his role, the role of Ms. Bigger, and the roles of GSA and USFK on this acquisition.

GSA called as well several other witnesses. Russell Wong, a GSA computer specialist from 2003 to 2006, testified primarily as to the use of MIPRs (military interdepartmental purchase requests). Mr. Philip Kwong, who was a major with USFK at the time, spoke regarding the supply of the HNAs, but not the specifics of the procurement. Mr. Stephen Durrett, the CO who issued the final decision, and Ms. Josephine Valentin, of the GSA finance office, provided limited testimony as to their respective roles.

Mitchell Stevens testified and he appeared to be cooperative with both parties. He had operated as a contractor employee for USFK, and while not a government employee, essentially ran the operation as to procurement actions on the satellites. He was involved in both the formation of the initial task order for the HNAs and further implementation. He addressed why the items were needed; the intent of USFK at the time of contracting; GSA interaction with USFK, including what was provided to USFK and GSA, and when. He was not on the project at the time GSA discovered the payment error or returned the money.

Mr. Paul Nagasawa merits comment, even though he was not a witness. He was the head of, and managed, the GSA Korean procurement office and was Mr. Smithey's supervisor. He did not participate in day-to-day procurement and was not a CO, but he was the designated official for receiving the funding document (the MIPR) that was supposed to provide money for the disputed HNAs. GSA sought Mr. Nagasawa's participation in the proceedings, but he declined.

Facts

In August 2003, GSA issued a request for quotations (RFQ) for commercial satellite services in support of USFK. The RFQ was to serve as a basis on which quotations could be solicited and task orders awarded under the GSA Federal Supply Schedule (FSS). The original task order was awarded in the amount of \$2,914,339. A segment of the award was for HNAs. Each HNA had two components—a five-year license and a yearly usage or frequency charge. In order for USFK to operate a satellite terminal in Korea, USFK had to

have an associated HNA license in operation. With that in place, GSA and USFK could then pay a yearly frequency fee for usage.

The statement of work (SOW), set out in the RFQ, contained the following language:

International Commercial Satellite Services: Provide Host Nation Authorizations (HNA) in Korea; Negotiate and provide HNA, Transponder tax, and local frequency licensing IAW [in accordance with] Korean Military Information and Communications (MIC) for each terminal and within each province region; Provide ROK [Republic of Korea] installation service at each site; Training and Translations with Korea host nation, Negotiate and provide Korean training instructors, translation of technical manuals, and technical translator services for meetings between ROK and American technicians and managers.

AGS submitted a proposal to GSA that contained pricing for thirteen HNAs (the five-year license and one-year frequency charges for each HNA). The licenses were priced at \$7000 each and the frequency charges at \$5000 per year. The HNAs were to be used with terminals. Terminals were not part of the AGS proposal. In an attempt to address adding additional HNAs, AGS placed an asterisk by its price quote and provided, "Additional Terminals can be added at a cost of \$5,000 per terminal." The wording "additional terminals" in this context referred to the HNAs and not terminals (hardware) themselves. While only thirteen HNAs were initially procured, USFK intended to add later a significant number. The initial thirteen were a test sample. Mr. Stevens confirmed that all parties, including GSA, were aware at the time of award of an anticipated need for more HNAs.

On August 28, 2003, GSA awarded task order 9T3APN018 to AGS. The award included the thirteen HNAs and the associated one-year frequency services. David Williams was the GSA CO for the task order. The order identified the initial period of performance as October 1, 2003, through September 30, 2004. The task order period was later extended to May 31, 2005, through issuance of four modifications. Notwithstanding the GSA recoupment action in 2006, GSA and USFK continued to use the HNA five-year licenses until they expired.

At the time of award, GSA advised AGS that the task order would be incrementally funded via modification to a full ceiling price of \$5,115,611, based on availability of funds. The task order provided that the contract was not to exceed the total task dollar value ceiling. The award provided that any work done or expenditures made, beyond the increments of the funding obligated to the contractor, would be at the contractor's risk. At the time GSA paid

for the disputed HNAs under the invoice, it does not appear that the cost ceiling had been reached.

The Korean government required that HNAs and the frequency services be provided under the auspices of a local Korean company, which was to operate as the in-country agent for the contractor. ISS was AGS's chosen in-country agent for the purposes of obtaining HNAs for the Defense Intelligence Agency network terminals. ISS had been acting in that capacity since 2003 and had provided the initial thirteen HNAs to AGS. GSA was not the only entity that could contract for HNAs for use in Korea. However, GSA was the sole ordering source or partner for HNA services that were to be used and procured for USFK.

The purchases of satellite services for USFK was done through what GSA described as an assisted acquisition, involving USFK and the GSA office in Korea. GSA had a financing office in San Francisco which ultimately issued payment based on the GSA office in Korea approval. The San Francisco office had no role in contract management.

Under the USFK/GSA assisted acquisition, USFK identified for GSA what USFK wanted, provided funding for purchases through what was identified as MIPRs, and asked GSA to provide execution of purchase instruments. Once award was made, GSA played a very minor role in management of the procurement and essentially was a conduit for payments and a source for adding modifications. GSA's acquisition assistance agreement with USFK called for a four percent fee on the total contracted through GSA's efforts.

A MIPR is a funding document that was utilized by USFK as a means for providing funds to GSA, so that GSA could secure work wanted by USFK. MIPRs typically contained a description of the work being funded. Once the funds were made available to GSA through a MIPR, USFK anticipated that GSA would take the steps necessary to secure the items in a proper contractual manner. Mr. Stevens testified that as to the HNAs in issue, once USFK sent the November 3, 2003, MIPR that included funding for additional HNAs, USFK thought it (USFK) was clear to proceed on securing more HNAs, up to that number. He testified that everyone knew (prior to initial award) that the initial thirteen HNAs would be inadequate and more would be needed.

USFK provided GSA with three MIPRs for services under task order 9T3APN018. They were, in order of issuance, MIPR3HOAF00354, MIPR4BOAF00096, and MIPR5DOAF00305. MIPR3HOAF00354 was dated April 30, 2003, and provided for satellite services for the USFK J2 CIVN program. Thereafter, USFK issued MIPR4BOAF00096 on November 3, 2003. That MIPR identified funds for forty-eight local license fees at \$5500 each, as well as funds for a separate line item, designated as host nation approval of forty-eight units, with each unit listed at \$7000. The items priced at \$5500 were

for one-year frequency fees, and the items listed at \$7000 were for the HNA multi-year licenses. The two items totaled in excess of \$500,000. USFK anticipated that once it provided funding to GSA through the November 2003 MIPR, GSA would do whatever was necessary to ensure that the work was properly contracted for, so that USFK could purchase the needed items. In this case, however, GSA took no action as to the November 2003 MIPR and it did not assign the dollars designated for the added HNAs into either the existing task order or another instrument to effectuate the purchase. GSA does not dispute that USFK provided the funds in the November 2003 MIPR for purposes of adding more HNAs. GSA, however, denies appellant is entitled to any money, because GSA never converted or assigned the money to a contract instrument. The third MIPR issued plays no role in the dispute. Accordingly, it is not discussed.

Notwithstanding the fact that GSA failed to act on the November 2003 MIPR, USFK had intended that MIPR to be used by GSA to fund the securing of additional HNAs. As Mr. Stevens explained, USFK thought that once it presented the MIPR to Mr. Nagasawa, it could proceed to purchase the services funded. For that reason, USFK and Mr. Stevens, who was acting on its behalf, expected that the money provided in the MIPR would be paid under the AGS contract. That is why USFK proceeded to secure the items and have AGS bill against the task order.

MIPRs are funding and not contract documents. They are solely between USFK and GSA. AGS was not a party to the MIPRs. There was no evidence that AGS knew of the specifics of the MIPRs.

Both Mr. Smithey and Ms. Bigger confirmed that GSA was to prepare contract documents when needed. Even though GSA had been involved in the initial preparation of the SOW for the existing task order and despite the fact that “everyone” (as testified to by Mr. Stevens) knew at the time of the original SOW that thirteen HNAs would be inadequate, GSA took no action to create a contract instrument for the work sought under the November 2003 MIPR. Further, GSA appeared to take no role in monitoring or managing the work, but seemed to rely entirely on USFK to manage the project and deal with any issues.

As best as can be determined, GSA, despite approving the invoice for over \$500,000 worth of HNAs, was unaware until early 2006 that AGS had provided more than the initial thirteen HNAs.

Mr. Smithey stated this was an assisted acquisition and as such, GSA relied upon USFK. If USFK wanted to communicate operational requirements for GSA to purchase, then USFK would send the funding and work description to Mr. Nagasawa, head of the GSA Korea procurement office, who would then assign it to GSA contracting personnel. Mr.

Smithey stated that if the MIPR was assigned to him, he would assign the matter to Ms. Bigger, noting that she functioned as a contract specialist, working alongside him. The November 2003 MIPR, providing funding for forty-eight additional HNA licenses and frequency services, was sent to Mr. Nagasawa. Though we have no testimony that it was forwarded, absent evidence to the contrary, we conclude that the MIPR would have been provided to Mr. Smithey's attention. Why it was not processed thereafter by the GSA was not addressed during the hearing.

Once Mr. Smithey assigned a matter to Ms. Bigger, she was to contact the requiring activity to get the documentation necessary to formulate and then implement any needed contract action. It was Ms. Bigger's role to put together specifications, review quotations, and prepare all documents, both pre- and post-award. She was identified by various witnesses as the primary contact person at GSA for USFK. She also was assigned the role of approving invoices, although she described the function as a mechanical operation, relying entirely on USFK for any verifications. Mr. Smithey testified he had no role to check invoices for contract compliance.

Ms. Bigger had no contracting authority, and according to Mr. Smithey, she would have consulted with him if contracting authority was needed. There was no evidence as to any conversations or inquiries between Ms. Bigger and Mr. Smithey as to the invoiced HNAs, discovery of the invoice paying error, or the return of money to USFK. The methodology that was described revealed that in the case of contracts with USFK, Mr. Smithey essentially turned matters over entirely to Ms. Bigger. Then, she essentially relied upon USFK to take care of matters and conducted no independent review or management.

Evidence at the hearing supports that Ms. Bigger held a more significant procurement role than that described at the time we ruled on the motions in August 2014. She was then portrayed as an administrative functionary, essentially handling paper, with no substantive involvement. However, her role was more substantial. Also, at the time of the motions, there was no focus on Mr. Smithey, who was the CO not only at the time the invoice was paid, but also the CO at the time of the return of the money to the Army, the recoupment of funds from AGS, and during the period of continued use of the licenses.

While USFK expected that by the end of 2003 it would need more HNAs than the thirteen initially secured, it did not require more until some time in 2004. By that point, USFK had conducted testing and decided not to move forward with the thirteen HNAs it had. Then, during the first half of 2004, USFK, in a completely separate transaction, having no GSA involvement and without GSA knowledge, purchased fifty terminals (hardware) through a contract handled by the Department of the Interior (DOI). Mr. Stevens was heavily

involved in this terminal purchase. That purchase created a need for more HNAs, because each terminal needed an HNA to operate.

At some point in July 2004, Mr. Stevens, acting for USFK, contacted ISS to secure additional HNAs. He testified that USFK believed that because it had provided GSA funding for the added HNAs, USFK could proceed with securing them from the vendor (AGS) under the task order and needed no further GSA approval. Therefore, he contacted ISS directly. He stated he sought forty-eight HNAs, as that quantity was reflected on the November 2003 MIPR. ISS proceeded to provide the items starting in 2004 and continuing through 2005, billing AGS as items were being provided. In the period of 2004 through June 2005, ISS billed AGS for forty-nine HNA licenses (billing as they came on line). ISS billed a slightly smaller number of frequency services. The accumulated total bill was \$579,793.52. AGS then invoiced that sum on invoice 90037154, dated June 22, 2005. The work was identified on the invoice, under the service description, as Host Nations Agreement/Licensing/Frequency Taxes at \$569,793.53. There was also a separate charge of \$10,000 for training and translation services. The invoice did not show a quantity, but rather a lump sum. We do not have evidence as to whether AGS attached the underlying bills from ISS.

GSA paid the invoice in full on September 15, 2005, for \$579,793.52. According to AGS, at that point, GSA still had \$1,105,464.72 in available funds of the \$5,115,611 total funding level. The parties stipulated (at the time of filing of motions) to the contents of the approval form that was signed and paid by GSA:

GSA transaction records note the following for AGS Invoice 90037154: "Client Date Reviewed: 8/14/2005", "Client Authorization, Accepted" *Accepted by Elizabeth Bigger at 8/23/2005 11:43:44 PM.* See IT-Solutions Shop Acceptance Information Invoice 90037154, attached as Attachment 1. In August 2005 Elizabeth Bigger was a Technology Project Adviser working for GSA Federal Technology Service, Asia Business Team.

Ms. Bigger was the only GSA official taking part in the approval. When she paid the invoice against the task order, she believed it was a valid payment. GSA did not contend that the payment was invalid, until later. GSA has never provided an explanation as to what triggered its notice of the error and identified no individual associated with the discovery. No notice of the payment error was provided to AGS, and GSA did not notify AGS when it started its recoupment.

According to the stipulation of the parties and testimony of Ms. Bigger, the invoice had first been approved by USFK, before being signed off by GSA. It appears that Ms.

Bigger had no information other than USFK approving payment. While the invoice did not break down numbers of licenses or frequency charges, the invoice was clear that the payment was for HNAs. At the time of approval of the invoice, the only HNAs under contract were the thirteen that had been earlier provided. Ms. Bigger acknowledged that she approved payment, without any independent GSA review as to either the furnishing of the services or whether the work was covered under an existing contract. GSA's lack of a review function was consistent with practice throughout this task order. In the GSA/USFK relationship, GSA relied entirely upon USFK to approve, verify, and manage USFK procurement of the satellite services and associated HNAs.

Ms. Bigger testified that she would check the system to make sure that she did not have any open invoices that had been approved by the client. After client approval, she would make sure it was hers (GSA's) and she was supposed to click on it. She said that "she might" just check to make sure the correct numbers were in the right places as far as the task order number or anything like that. She did not "review any of the actual meat of the invoice of the work or anything like that." It was an administrative-type review. She stated she would just receive the invoice with no supporting documentation and if the GSA finance office in San Francisco requested additional documentation, then either San Francisco or the user would handle the matter. She stated that she was not verifying that the work invoiced was for work that was actually performed, noting that if it was not performed then the client would not approve it. If USFK said it was "okay," then she simply clicked "okay," and that was sufficient to get the payment through the San Francisco computer. She said that she understood that only invoices that were expressly against a written contract would be submitted, but testified she would have had no sense as to whether the work had been submitted under an express written contract. GSA assumed if there was a problem, USFK would pick it up.

Mr. Smithey confirmed that the office policy was to rely on the using agency (USFK), and once an invoice came in, if user said it was "okay," then it was sent ahead to the San Francisco office for payment, with no further independent review. It was his understanding that Ms. Bigger would look the invoice over to make sure everything was in conformance with the contract terms and conditions, and then she would submit it for payment. He did not see invoices. He identified Mr. Stevens as the individual at the using activity who would be the reviewer for USFK and thought Mr. Stevens was a government employee. He said it would be a mistake to approve an invoice for work that was not in an express written contract, but said that if it was submitted into the GSA computer system, then surely the requiring activity and information technology manager would have known that.

Mr. Stevens testified that at least forty-eight HNA licenses would have been in place by late 2005. That appears generally consistent with the invoices and compilation sheet

provided at the hearing which showed forty-nine HNAs provided by June 2005. Mr. Stevens did not directly address frequency charges, but those generally were put in place soon after the HNA was activated.

GSA, the only party that would have the information, provided no specific date for its discovery of the unauthorized payment, nor did it specifically identify the first date for recoupment. Nevertheless, the evidence establishes a window during which GSA would have certainly discovered the payment error and during which GSA would have begun recoupment. The window runs from November 2005, the date on which GSA says it made its last affirmative payment to appellant (before discovering the error), and May 2006, when GSA closed out the contract. GSA knew about returning funding at some point in January 2006. At that point GSA realized that it had over \$500,000 in what appeared to it to be unobligated funds. By March 2006, GSA returned the money, and by May 2006, GSA moved to close out the contract. We do not have a specific date for the start of the recoupment, but find it logically had to occur before close out, as we find it inconceivable that the GSA office in Korea would have been able to sort out unobligated funds, been willing to close out the task order and contract, and done so without knowing that it had overpaid and that it intended to recoup the payment. Further, there has been no evidence presented by GSA to suggest that it learned of the error at a point after the task order was closed out. Moreover, because GSA was the only party that could establish the date of notice, we choose to make any inference in this matter in favor of the appellant.

Notwithstanding GSA's recoupment of the money paid for the HNAs, USFK continued to use the licenses until the expiration of their five-year term. In contrast, and because the frequency services of the HNAs ran for a single year as opposed to a five-year term, depending upon the date of activation, many of the one-year frequency charges would have been fully utilized by early 2006. Based upon the ISS compilation of installation and the invoices that ISS submitted to AGS, we find that fifteen of the one-year charges would have remained active as of April 2006. It is our understanding that USFK continued to thereafter use the licenses and to pay frequency charges; however, the frequency charges for subsequent years were compensated under another contract and are not in issue in this claim.

In May 2006, GSA officially closed out the task order. There is no evidence to show that at any point between November 2005 and May 2006, GSA took any action to notify the appellant of GSA's discovery of the payment error, of its conclusion that the HNA purchase was not properly authorized, and of its recoupment of money from other AGS contracts. That lack of notice continued, with the matter only coming to light because the appellant's accounting firm found a discrepancy in payment in its audit in November 2006. Notwithstanding its failure to notify the appellant, GSA, in briefing, asserts that the appellant failed to notify it on the close-out form in May 2006 that there was a payment problem. The

appellant did not indicate that there was a problem or that money was still owed, because the appellant did not realize it was being short paid on other invoices until late 2006. Further, while we have found that the appellant's interpretation of the SOW was not accurate, there is no question that the appellant and evidently USFK (Mr. Stevens) thought that the existing contract or the furnishing of MIPR money covered the work.

In November 2006, after the appellant's accountant discovered a discrepancy between what the appellant had provided and what was paid, GSA and AGS held a meeting, which is memorialized by an e-mail message. The message reflects that discussions were held between the appellant and GSA as to short payments and that Mr. Smithey may have participated in the discussions. Even if he did not participate, he was copied on the e-mail message discussing the meeting. Thereafter, exchanges took place well into 2008, as AGS attempted to secure payments it believed were due. At some point in 2008, Mr. Smithey advised the appellant to submit the matter as a claim, and the appellant did so on March 18, 2008, seeking \$597,456.80. Once the claim was filed, it was assigned to a different CO and exchanges continued. In 2010, the matter was re-assigned to Mr. Durrett as the CO.

GSA turned to Mr. Stevens for information, and he responded with an e-mail message dated June 21, 2010. He said that in 2005, GSA had contracted for forty-eight HNAs and frequency licenses (citing to the November 2003 MIPR), and USFK executed up to forty-eight installations that year. He further expressed the opinion that AGS must have had billing problems, for they did not bill in the task order year for \$597,566.08. He continued that GSA then sent the un-billed funding back to 8th Army and finally that no one in the CIVN Divn program was aware the funds were returned.

In addition to Mr. Stevens' statement as to the number of HNA licenses provided, the record contained invoices that had been submitted to AGS by ISS for the disputed items, as well as a compilation sheet which identified the location of HNAs and when they were activated. GSA did provide some limited evidence as to the number of HNAs that were provided and when they were installed. However, we found that information to be inconclusive. In contrast, we found the numbers provided by Mr. Stevens and those identified in the ISS invoices to be more accurate.

On November 15, 2010, the CO issued a final decision denying the March 18, 2008, claim, citing lack of evidence from AGS regarding the existence of a contract and proof of payment.

Appellant filed a timely appeal.

Discussion

In our August 2014 ruling on cross-motions for summary relief, we found there was no express contract between the appellant and GSA for providing the HNAs in dispute and no legally binding implied-in-fact contract created by GSA's acceptance and payment of the June 2005 HNA invoice. We left open the matter of ratification. While additional evidence was offered at the hearing, we affirm our earlier ruling as to there not being an express contract created by the payment of the invoice. Accordingly, we now turn to the issue of ratification.

Ratification is the adoption of an unauthorized act resulting in that act being given effect as if originally authorized. It validates a formerly unauthorized contractual action. Restatement (Second) of Agency § 82 (1958); *Williams v. United States*, 127 F. Supp. 617 (Ct. Cl. 1956); *Parking Co. of America*, GSBCA 7654, 87-2 BCA ¶ 19,823. Paying a claim, based on ratification, is an extraordinary remedy and the appropriateness of ratification is very much fact driven, with no specific factual pattern being required. *Janowsky v. United States*, 133 F.3d 888 (Fed. Cir. 1998); *Silverman v. United States*, 679 F.2d 865 (Ct. Cl. 1982). Ratification is utilized in appropriate cases to deal with unauthorized commitments benefitting the Government for which a contractor could otherwise not be paid. As stated in *Janowsky*, which overturned a lower court decision involving a claim against the Federal Bureau of Investigation, one of the situations that will support ratification is one in which an agency overreaches by allowing the continuation of the services and benefits but denies payment. In issuing its decision, the Court stated that the lower court had 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." 133 F.3d at 892.

Relief through ratification is an exception to the otherwise black letter law as enunciated in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947), the seminal case which sets out the proposition that the Federal Government can only be bound by those with actual authority.

An earlier unauthorized commitment does not have to be expressly authorized to be ratified. A commitment can be ratified by the actions or inactions of a government official having contracting authority, even though that official was not involved in the earlier unauthorized commitment. *B.V. Construction Inc.*, ASBCA 47766, et. al., 04-1 BCA ¶ 32,604; *Kumin Associates, Inc.*, LBCA 94-BCA-3, 98-2 BCA ¶ 30,007 (1997); *Carter Pierce Mechanical Services, Inc.*, LBCA 91-BCA-1, 98-2 BCA ¶ 30,009 (1997); *Parking Co.; W. Southard Jones, Inc.* ASBCA 6321, 61-2 BCA ¶ 3182. The Government can be bound to pay for otherwise unauthorized contract work, even where neither the initial commitment nor

the ratification was carried out by an official empowered with contracting authority. *Janowsky; Silverman*.

The Government can ratify an otherwise unauthorized contract commitment through constructive means or through a direct affirmative act. *Williams; Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636 (2010); *Sinil Co.*, ASBCA 55819, et al., 09-2 BCA ¶ 34,213; *Parking Co.* Constructive notice can be created by an official observing an activity and then failing to take appropriate action, or when an official allows someone without authority to be his/her eyes and ears or cedes control to a subordinate, thereby allowing that person to act in his or her stead. In appropriate instances, knowledge of the subordinate can be and is imputed to the contracting official. *See B.V. Construction; Healthcare Practice Enhancement Network, Inc.*, VABCA 5864, 01-1 BCA ¶ 31,383; *Sociometrics, Inc.*, ASBCA 51620, 00-1 BCA ¶ 30,620 (1999) (board could draw no conclusion other than the CO representative was the eyes and ears of the CO); *Urban Laboratories, Inc.*, ASBCA 24905, 84-3 BCA ¶ 17,515 (imputing to the absent CO knowledge of food service officer who was responsible for certifying invoices, among other contract management duties and citing the CO reliance on this individual during the contract). Constructive notice can be established where an official knew or should have known of a matter but allowed it to continue. Silence or inaction may constitute adoption, including the failure of an authorized representative to curtail a contractor's activities. *Parking Co.; W. Southard Jones*.

In *Healthcare Practice Enhancement*, 01-1 BCA at 154,987, the VABCA addressed constructive notice in the context of ratification, where it stated:

We conclude that in cases in which a Government official, though lacking in actual 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 . . . or the non-authorized Government official who entered the agreement was a senior or high level official . . . then the Government is liable to compensate the contractor.

In the instant case, the facts largely fit within the parameters of *Janowsky*, in that GSA clearly allowed USFK to continue using the HNA licenses, thereby taking the benefit at no cost. Clearly, GSA knew by early 2006, and certainly by May 2006, that USFK was using licenses that had not been properly procured. *Janowsky* makes it clear that the Government cannot continue to receive the benefits and expect not to pay for them.

The remaining matter is GSA's contention that even if benefits were received, no one with either actual or constructive authority knew the benefits were continuing and still being

received. That position ignores the overwhelming evidence that although Mr. Smithey was a non-participant, he clearly ceded his role to Ms. Bigger. The fact that he did not expressly delegate contracting authority to her does not here relieve GSA from liability. Someone at GSA had to be involved in the discovery of the mistaken payment, the arrangement for recoupment, and the return of the money. We know it was not Mr. Smithey, and lacking evidence from GSA otherwise, we conclude it had to have been Ms. Bigger. Whatever Ms. Bigger knew or should have known is imputed to Mr. Smithey. Otherwise the Government would experience an undeserved windfall.

We make one final point. GSA discovered the error in payment by early 2006, when most of the five-year license term remained and with many licenses having almost four years left to run. There was no reason why GSA could not have stopped using the services. Unlike a road that has been paved too wide, where there is no practical way to undo the extra work, the services here were divisible and GSA and USFK did not have to leave the licenses in place. GSA could have stopped the use or deactivated the licenses. That of course would have resulted in USFK not having the license for the remaining years. If USFK still wanted the use of the licenses, it could have paid for them. The fact that the initial payment may have been made in error, and the fact there was no authorized contract, does not give the Government the right to continue to use the licenses for free. AGS is entitled to be paid for the forty-nine licenses identified by ISS in invoices. In deciding as we do, we base the right to compensation on GSA/USFK's continuing use of the licenses.

As to the first-year frequency charges, we allow some, but not full recovery. At the time GSA discovered or should have discovered the error in early 2006, most of the first-year frequency charges had been either fully or substantially provided. A number, however, had not expired and as to those, GSA took no action to stop the usage. Based upon the ISS compilation and invoices ISS submitted to AGS, we find that in fifteen instances (using April 2005 as a baseline for the start), USFK continued to benefit from the frequency charges past the date of GSA notice. Appellant is entitled to be paid for those charges that continued, after GSA notice.

Quantum

Neither party offered significant evidence on the issue of quantum. In determining quantum, we use the forty-nine HNAs identified by ISS in its invoices. ISS billed AGS at \$7000 per unit and AGS paid ISS that rate. There was no testimony as to whether the \$7000 figure would have changed if the duration of a license had been four years rather than five. We therefore allow quantum based on the invoiced amount of \$7000 for each of the forty-nine HNAs, totaling \$343,000, plus interest from the date of the certified claim. We also allow compensation for fifteen frequency charges at \$5000 each, totaling \$75,000.

Other issues

GSA argues that the claim cannot be paid because the task order contained a ceiling price which AGS was not to exceed and that payment of the sum would have violated that ceiling price. Appellant offered evidence that at the time of the payment of the invoice that the ceiling was not exceeded. Further, it appears that the unused money for HNAs from the November 2003 MIPR was still available until its return, in 2006. Neither party provided witnesses or evidence at the hearing as to this defense. In this instance, GSA has presented the matter as a shield, but has not provided supporting evidence to justify the cost ceiling as a bar to the claim. GSA cannot prevail on that defense.

Decision

Accordingly, we **GRANT IN PART** the appellant's claim, as to the five-year HNA licenses in the amount of \$343,000. We also grant the claim as to fifteen of the yearly frequency charges for \$75,000. We **DENY** the claim as to the remaining first-year frequency charges. Interest is to run from the date of the certified claim until the date of payment.

HOWARD A. POLLACK
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

PATRICIA J. SHERIDAN
Board Judge