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CONTRACT APPEALS BOARD
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★★★

February 7, 2000

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SUBJECT: CAB No. **D-1100** (Appeal Of: **Second Genesis, Inc.**)

Attached is a copy of the Board's Opinion Granting the District's Motion to Dismiss and Dismissing Appellant's Complaints for lack of jurisdiction.

BARBARA THOMPSON
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

SECOND GENESIS, INC.)
) CAB No. D-1100
Under Contract No. HC/AD 9811[1])

For the Appellant, Second Genesis, Inc., Richard L. Moorhouse, Esq. and David P. Hickey, Esq., Reed, Smith, Shaw & McClay, LLP. For the Government, Thomas J. Foltz, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Jonathan D. Zischkau, concurring.

OPINION AND ORDER

This appeal presents a claim for payment of $528,626.68 for breach of contract, or, in the alternative, for compensation for costs incurred in good faith and innocent reliance on a contract later determined to be void. The District of Columbia filed a motion to dismiss the appeal for lack of jurisdiction, or, if within the jurisdiction of the Board, for failure to state a claim upon which relief can be granted. We dismiss the appeal for lack of subject matter jurisdiction.

BACKGROUND[2]

On February 7, 1997, the District of Columbia Department of Human Services ("DHS") issued Solicitation No. JA-SC-DH-70047-01 ("the Solicitation" or "RFP") for residential substance

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[1] The appeal is styled under contract number HC/AD 9811. That number is the contract number assigned to a contract with RAP, Inc. which resulted from the same solicitation. Appeal File ("AF") Tab 8. The appellant alleges a contract with a number related to the solicitation number, JA-AC-DH-70047-01. (AF Tab 7).

[2] In construing rules of practice, the Board is guided by precedent of the District of Columbia courts. Board Rule 100.6. When a motion for dismissal based on lack of subject matter jurisdiction asserts that the lack of jurisdiction is apparent on the face of the complaint, the Superior Court treats the motion in the same manner as a motion filed under the rule governing motions for dismissal based on failure to state a cause of action. *Matthews v. Automated Systems and Services, Inc.*, 558 A.2d 1175, 1179 (D.C. 1989). The District does not, at this time, contest the allegations of the complaint. *Motion to Dismiss* at 4. "In considering a motion to dismiss a complaint for failure to state a claim, this court shall construe the facts on the face of the complaint in the light most favorable to the non-moving party, and accept as true the allegations in the complaint." *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). For purposes of determining these motions, the Board has accepted as true the allegations of the complaint, and the contents of documents referred to in the complaint and included in the Appeal File ("AF") by both parties. *See Bible Way Church v. Beards*, 680 A.2d 419, 434 fn 4 (D.C. 1996).

addiction treatment services. The Solicitation, prepared on a standard District of Columbia "Solicitation, Offer and Award" form containing, with continuations, 87 pages, requested offers to provide the District with 1 to 27 (minimum/maximum) "slots" for adult short-term care; 1 to 77 slots for adult intermediate term care; and 1 to 25 slots for youth short-term intermediate care. (AF Tab 12).

The RFP provided, in part:

> The undersigned offers and agrees that, with respect to all terms and conditions accepted by the District under "AWARD" below, this offer and the provisions of the RFP/IFB will constitute a formal contract.

(*Id.* at 1).

* * *

> The Department of Health reserves the right to inspect all facilities prior to execution of the contract or placement of clients. . . .

(*Id.*, Section C.7.2 at 22).

* * *

> INSPECTION OF FACILITIES BEFORE AWARD
>
> Prior to award of any contract for these services, the District will inspect the offeror's facility(ies) it intends to provide in-patient substance addiction treatment services to adults and youths, in order to substantiate the offeror's ability to provide the services required in Sections C and H.

(*Id.*, Section E.1.1 at 28).

* * *

> The term of the contract shall be for the period of one (1) year from the date of award as specified on page one (1) of the contract, subject to the District's option to extend the term of this contract.

(*Id.*, Section F.1 at 29).

* * *

> PRE-AWARD APPROVAL
>
> Authority Approval: In accordance with the regulations adopted pursuant to the District of Columbia Financial Responsibility and Management Assistance Act of 1995, P.L. 104-8, before the District may award the contract, the District of Columbia Financial Responsibility and Management Assistance Authority must approve the contract.

(*Id.*, Section I.21.1 at 56).

In response to the Solicitation, Second Genesis, Inc. ("Appellant" or "Second Genesis") submitted a fully compliant and responsive initial proposal on March 14, 1997. Negotiations proceeded through June 1997. (Complaint ¶3).

On July 10, 1997, Second Genesis submitted its fully compliant best and final offer ("BAFO"). On August 5, 1997, Second Genesis submitted an additional explanation of its July 10 BAFO. (Complaint ¶6).

On August 12, 1997, the District orally advised Second Genesis that it had been selected for award of a contract for a portion of the services originally solicited and asked Second Genesis to sign proposed contract documents. That same day, in the presence of District contracting officials, the Deputy Executive Director of Second Genesis signed the proposed contract which had been prepared by the District. (Complaint ¶7). The document executed by Second Genesis differed in form, although not in substance, from the Solicitation and Second Genesis' BAFO. The District officials who were present did not sign the document. (AF Tab 7).

The proposed contract signed by Second Genesis provided in part:

* * *

> (Contractor shall not commence performance until the District has signed this document)

(*Id.* at 1 immediately above space for contractor's signature).

* * *

> Period of Contract:
> From Date of Award
> To 12 Months Thereafter

(*Id.* at 1 in lower right-hand corner).

* * *

> ARTICLE 4 - TERM OF CONTRACT
>
> The term of the contract shall be [f]or the period of one (1) year from date [of] award as specified on page one (1) of the contract subject to the District's option to extend the term of this contract.

(*Id.* at 2).

* * *

ARTICLE 7 - PRE-AWARD APPROVAL

Authority Approval - In accordance with the regulations adopted pursuant to the District of Columbia Financial Responsibility and Management Assistance Act of 1995, P.L. 104-8, before the District may award the contract, the District of Columbia Financial Responsibility and Management Assistance Authority must approve the contract.

(*Id.* at 4).

In reliance upon the District's oral notification that it had won the award, corroborated by the proposed contract presented to it for signature, Second Genesis proceeded, with the knowledge of the District, to mobilize its personnel and resources to perform the contract which it anticipated would be finalized. (Complaint ¶¶8 and 10). On August 27, 1997, Drs. Jasper, Ormand and Roach, representing the DHS Addiction Prevention and Recovery Administration, conducted an inspection tour of the Second Genesis facility in order to insure that Second Genesis was prepared to commence performance. During the tour, various details were finalized in anticipation of implementing the contract, including specific discussions of admission procedures, referrals and treatment programs. The agency officials conducting the inspection orally advised Second Genesis that the District expected to begin to utilize the beds within a number of weeks. (Complaint ¶11). Second Genesis held staff and facilities available for the immediate use of the District at a cost claimed to be in excess of half a million dollars. (Complaint ¶9). No beds were ever utilized. (Amended Complaint ¶11(b)).

The District retained the proposed contract signed by Second Genesis, but no District official signed it. On November 25, 1997, apparently at the request of the District, Second Genesis confirmed its "intent to honor the pricing set forth in our technical and price proposals submitted in response to the District's Solicitation. . . ." (AF 13). On January 2, 1998, almost 11 months after the Solicitation was issued, and nearly five months after execution by Second Genesis of the proposed contract documents, the District submitted the proposed contract to the Council of the District of Columbia ("City Council") and the Financial Responsibility and Management Assistance Authority ("Control Board") for their respective approvals. (AF 13). The City Council took no action on the request. By operation of law, the contract was deemed to have been approved by the City Council January 15, 1998. (*Id.*; D.C. Code §1-1130(b)(2)(A)).

After its receipt of the request for approval, the Control Board, without approving the proposed contract, requested further information. (*Appellant's Opposition and Reply to Supplement to Appellee's Motion to Dismiss*, Tab A). The District did not provide the information requested. Instead, on February 18, 1998, the District advised Second Genesis that it was reopening the procurement (Complaint ¶13), effectively withdrawing the proposed contract from the Control Board. On March 5, 1998, the District issued a "Second Amendment" to the Solicitation clarifying certain terms. Second Genesis participated in the reopened negotiations submitting a new BAFO on April 10, 1998. (Complaint ¶18). Second Genesis continued to incur costs and on several occasions thereafter extended its most recent offer. (Complaint ¶19). The District also opened negotiations with RAP, Inc.

At the conclusion of the reopened negotiations, RAP was selected for award. On December 15, 1998, the District submitted a proposed contract with RAP for approval by the City Council and Control Board. The City Council took no action, causing the contract to be deemed approved December 25, 1998. (AF Tab 6). The Control Board approved the contract January 28, 1999. (AF Tab 5). The proposed contract was executed by RAP on February 2, 1999, and accepted by the District on February 3, 1999. (AF Tab 8).

DISCUSSION

The Second Genesis complaint includes four counts: Count I, Breach of Contract; Count II, Equitable Estoppel; Count III, Breach of Contract - Improper Failure to Terminate for Convenience; and Count IV, Good Faith and Substantial Compliance. Second Genesis contends that the District entered into a valid contract with it, or, due to the District's course of conduct, that the District is equitably estopped to deny that it entered into a valid contract. In the alternative, Second Genesis contends that it is entitled to be compensated for costs actually incurred based on its innocent reliance on a void contract with the District. The District seeks dismissal of the complaint on the basis that the Board lacks subject matter jurisdiction because no contract ever existed, or, in the alternative, that the complaint fails to state a claim upon which relief can be granted for the same reason, that is, if no contract existed, no contract can have been breached.

I. Jurisdiction of the Board is based upon contract

Jurisdiction of the Board over appeals is established by the Procurement Practices Act of 1985, as amended ("PPA"), codified at D.C. Code § 1-1181 *et. seq.* The PPA empowers the Board to hear "[a]ny appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, when such claim arises under or relates to a contract." D.C. Code § 1-1189.3(a)(2). Thus, the Board's authority is predicated on the existence of a contract. For this Board to have jurisdiction over an appeal, the appellant must be a "contractor" and the claim must be one which "arises under or relates to a contract." Absent a contractual relationship, the Board is without jurisdiction to act.[3] The Board has jurisdiction to consider disputes arising out of express contracts and implied-in-fact contracts, *see Robert K. Adams*, ASBCA No. 34519, 89-2 BCA ¶ 21,699 at 109,094, as well as contracts entered into, but later determined to be void pursuant to D.C. Code §1-1182.5(d). *S.W. Imaging, Inc.*, CAB No. D-806, Jan. 23, 1992, 39 D.C. Reg. 4393, 4398.

The initial question to be determined is whether at any time a contract came into existence between Second Genesis and the District. Absent a contract, we have no jurisdiction to consider this appeal. We conclude that the parties never entered into a contract.

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[3] The PPA is based on the Federal Contract Disputes Act of 1978, 41 U.S.C. §§ 601, *et. seq.* Jurisdiction of Federal boards has similarly been held to be limited to matters based on "valid contractual theory." *Paragon Energy Corp. v. U.S.*, 645 F.2d 966, 975, 227 Ct.Cl. 176 (1981).

II. A written contract is required by law

Effective April 12, 1997, after the extended date for submission of proposals (March 17, 1997), but prior to completion of the first negotiations with Second Genesis (August 12, 1997), the City Council adopted legislation requiring that all District government contracts be in writing. D.C. Code §1-1181.5 provides:

> (d)(1) No District employee subject to this chapter shall authorize payment for the value of goods and services received without a valid written contract. This subsection shall not apply to a payment required by court order or a final decision of the Contract Appeals Board.
>
> (2) After April 12, 1997, no District employee shall enter into an oral agreement with a vendor to provide goods or services to the District government without a valid written contract. Any violation of this paragraph shall be cause for termination of employment of the District employee.
>
> (3) Any vendor who, after April 12, 1997, enters into an oral agreement with a District employee to provide goods or services to the District government without a valid written contract shall not be paid. If the oral agreement was entered into by a District employee at the direction of a supervisor, the supervisor shall be terminated. The Mayor shall submit a report to the Council at least 4 times a year on the number of persons cited or terminated under this provision.

The statutory policy could not be clearer. After April 12, 1997, no District employee has authority to enter into a contract other than in writing. To add emphasis, the Council separately provided that no employee shall make payment on a contract not in writing, and, seemingly redundantly, but certainly emphasizing the point, provided that no vendor shall be paid without a written contract. Further, violation of this provision may be cause for termination of the employee making an oral contract, and, if made at the direction of a supervisor, the supervisor "shall be terminated." We cannot take this injunction of the Council lightly. *See Pitts Motor Hotel*, CAB No. D-1008, Aug 13, 1999, 46 D.C. Reg. 8653.

III. There is no written contract

The requirement that District government contracts be in writing is an application to government contracts of the so-called "statute of frauds" doctrine which is applicable to commercial contracts.[4] Pursuant to this doctrine, a writing which is not signed by the party charged, is not a

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[4] *See*, for example: D.C. Code § 28:2-201 Formal requirements; statute of frauds

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

"written contract" since a contract is not complete and binding until it is signed by both parties. *Braun v. Yaffee*, 193 A.2d 895, 896 (D.C. 1963).

The need to complete a contract by signatures of both parties is particularly critical in the context of government contracts practice which utilizes multipurpose documents. The government typically relies on standard forms which are prepared once, but have changing functions at different stages of the procurement cycle as blank spaces are completed and signatures are added.

The instant Solicitation was prepared on a standard "Solicitation, Offer and Award" form. That form, together with a description of the needs of the government, is intended to be issued by the District as a request for proposals to interested suppliers. The same form is to be completed and executed and returned to the District as an offer by potential contractors. Several potential contractors may present offers. The completed form remains an offer until "accepted by the District . . . ," at which time, by its own terms, "the provisions of the RFP/IFB will constitute a Formal Contract."

Appellant's initial offer was submitted on the original Solicitation, Offer and Award form. After negotiation and submission of a BAFO, the terms, as negotiated, were entered by the District on a standard form "Contract for Goods and/or Services." That form, although prepared by the District, is intended to be first signed by the contractor as a final offer, and then accepted by the District. Directly above the space for the contractor's signature is the warning "Contractor shall not commence performance until the District has signed this document." The block for execution by the District is titled "Acceptance by the District."

Reading the allegations of the Complaint most favorably to the Appellant, there is a written memorandum of a contract which is signed by the Appellant only. The Solicitation was issued February 7, 1997. Proposals were received March 17, 1997. Second Genesis submitted a fully responsive proposal to the Solicitation. Negotiations continued through August 5, 1997. Second Genesis was selected for award by the District and the District presented contract documents based on the negotiated terms to Second Genesis. Second Genesis signed the proposed contract on August 12, 1998. The block entitled "Acceptance by the District" with space for a signature and date by the "Contracting Officer" was left blank. The proposed contract was never executed by the District. In the absence of a signature on behalf of the District, this document is not a written contract between the District and Second Genesis.[5] The law effective August 12, 1998, forbids the District Government from entering into any contract not in writing.

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[5]Appellant itself does not consistently allege that it relied on a written contract. Paragraph 8 of the Complaint states (emphasis supplied):

> In reliance upon the District's *statement* that it was the awardee, Second Genesis proceeded to mobilize its personnel and resources to perform the contract, such as reserving patient facilities, and incurred significant costs in doing so.

IV. There is no express contract

Whether or not a written contract is required by law, taking the allegations of the Complaint most favorably to the Appellant, the Board cannot find that any contract was completed, written or otherwise. "To be final, a contract must 'extend to all the terms the parties intend to introduce, and material terms cannot be left for future settlement.'" *Owen v. Owen*, 427 A.2d 933, 938 (D.C. 1981). The contract period was not defined.

On the first page of the contract form signed by Second Genesis, is a box entitled "Period of Contract." The "From" blank within that box is not completed with a date as intended, but rather the phrase, "Date of Award," is inserted. The date to be entered into the Period of Contract block is incorporated by reference in Article 4, "Term of Contract," which provides, "The term of the contract shall be [f]or the period of one (1) year from date award as specified on page one (1) of the contract. . . ." As a result of this circular reference, the dates upon which the alleged contract begins and ends, clearly essential terms of the agreement, are not stated *or determinable* from the document signed by Second Genesis.[6]

No specific contract starting date is alleged elsewhere in the Complaint. Various dates are asserted in the Complaint, but none is identified as the inception date. Paragraph 7 asserts that on August 12, 1997, Second Genesis signed the contract document in the presence of District officials. Paragraph 11 asserts that on August 27 a scheduled tour was conducted to insure that Second Genesis was "*prepared to commence* performance." That paragraph further asserts, and the Board accepts, that on that date "the District *expected* to begin to utilize the beds within a matter of weeks." (Emphasis supplied). Even viewing most favorably to the Appellant the allegation that an inspection was conducted, it cannot be concluded that by conducting the inspection the District acknowledged that a contact had been awarded prior to the inspection since Section E of Part I of the Solicitation provides: "*Prior* to the award of any contract . . . the District will inspect the offeror's facility . . . to substantiate the *offeror's* ability to provide services. . . ." (Emphasis supplied). No previous inspection is alleged. The most that can be drawn from the allegation is that Second Genesis had been chosen for award, not that the award had been made.

In the absence of a determinable starting and completion date of the contract, two clearly essential terms, there can be no express contract.

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[6] While the "date of award" might also be determined by the date the contract was signed by the District, as noted above, the proposed contract was never signed or dated by the District.

V. No contract is effective unless authorized by law

Regardless of whether the contract was complete as to all terms, and regardless of whether it was signed by the District, no contract can be entered into by the District unless all conditions precedent required by law have been met. *RDP Development Corp. v. District of Columbia*, 645 A.2d 1078, 1082 (D.C. 1994); *Heydl & Patterson International, Inc. v. F.D. Rich Housing of Virgin Islands, Inc.*, 663 F.2d 419, 429 (3d Cir. 1981).

Second Genesis had specific notice in the Solicitation and the proposed contract document it signed August 12, 1998, that no contract could be awarded unless approved by the Control Board. The Control Board Regulations provide:

> 5.2 No proposed Contract . . . [exceeding $9,000 for medical and human care services] shall be awarded or executed until and unless the Authority notifies the Contract Agency . . . that the proposed contract has been approved by the Authority. . . .
>
> 5.3 Any proposed Contract . . . which is awarded or executed without the notification provided in Section 5.2 . . . shall be illegal and void, and the Chief Financial Officer shall refuse to make payments under such Contract. . . .

(Resolution to Amend Authority's Contract Review Regulations, March 29, 1996).

Congress, in enacting the Control Board legislation, emphasized the importance of the Authority regulations by making their violation criminal:

> Any officer or employee of the District government who-- (A) takes any action in violation of any valid order of the Authority or fails or refuses to take any action required by any such order; or (B) prepares, presents, or certifies any information (including any projections or estimates) or report for the Board or any of its agents that is false or misleading, or, upon learning that any such information is false or misleading, fails to immediately advise the Board or its agents thereof in writing, shall be guilty of a misdemeanor.

(Pub L. No. 104-8, Apr. 17, 1995, §103(1)A).

It is undisputed that the Control Board did not approve the proposed contract with Second Genesis. Second Genesis was specifically notified that Control Board approval was required prior to award. There is no allegation that Second Genesis was erroneously advised that the Control Board had approved the contract, nor is there any allegation that Second Genesis could reasonably have assumed that approval had been granted. To the contrary, the need to confirm its proposal in

November 1997, was an indication that approvals had not been given and that the contract had not been awarded by that date.[7]

In addition to Control Board approval, City Council approval is required of any District government contract having a value of more than $1,000,000 (D.C. Code §1-1130), as was the case here. Although specific notice of this requirement was not included in the Solicitation or proposed contract, a proposer to the government is deemed to have constructive notice of all published statutory requirements. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947). The Mayor did not submit the proposed contract to the City Council for approval until January 2, 1998. 45 D.C. Reg. 405 (Jan. 23, 1998) (Complaint Exhibit A). Due to inaction by the City Council, the contract was deemed to have been approved by the Council on January 15, 1998. Even if only City Council approval were necessary, no award of a contract could have lawfully been made to Second Genesis until January 15, 1998. Approval was not deemed to have been given by the City Council until well after Second Genesis alleges that it began incurring cost. (Complaint ¶8).

No contract between Second Genesis and the District could be lawfully made without both City Council and Control Board approval. Although the contract was belatedly deemed to have been approved by the City Council, it is undisputed that the Control Board never approved the contract with Second Genesis. Based on the lack of approval by the City Council, no contract could have formed prior to January 15, 1998. However, in the absence of any approval by the Control Board, no express contract could have bound the District at any time.

VI. There is no implied-in-fact contract

An implied-in-fact contract may arise from the Government's direction to perform work, the appellant's compliance, *and* the contracting officer's tacit ratification by accepting the benefit of appellant's services. *Digicon Corporation*, ASBCA No. 36907, 89-3 BCA ¶ 21,966 at 110,497. Neither the first nor third minimum requirement to create an implied-in-fact contract is present in this matter.

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[7] Pursuant to the terms of the Solicitation, the District could only accept Second Genesis BAFO for a period of 90 days after submission. Paragraph L.25.1 entitled "Acceptance Period" provides:

> The offeror agrees . . . if its best and final offor is accepted within ninety (90) days from the date specified for submission thereof, to furnish services stated in the Price Proposal. . . . AF Tab 12 at 73.

The BAFO was submitted July 10, 1997. When the contract was not awarded by October 8, 1997, the best and final price proposal became stale. In November 1998, Second Genesis was apparently asked to reconfirm its price so that contract award could go forward. On November 25, 1997, Second Genesis confirmed its "intent to honor the pricing set forth in our technical and price proposals. . . ." (AF 13). Such a confirmation of *proposed* prices is not consistent with Second Genesis' assertions that a contract had already been awarded to it.

There is no allegation that Appellant was directed to commence performance. That Appellant was advised that it had won the award does not demonstrate a direction to perform. Indeed, the written proposed contract prepared after Appellant was advised that it was selected for award contained a specific warning that "Contractor shall not commence performance until the District has signed this document." There is no allegation that the proposed contract was ever signed by the District. As noted above, the fact that an inspection was conducted to determine if Appellant was *prepared* to perform does not imply a direction to proceed, since the Solicitation and proposed contract clearly state that such an inspection will be performed "prior to award."

Reading the Complaint most favorably to the Appellant, there is no allegation that the District accepted any benefit of Appellant's services. To the contrary, paragraph 11(b) of Appellant's Amended Compliant states: "Second Genesis did not receive patients from the District under Contract No. JA-AC-DH-70047-01 as signed by Second Genesis on August 12, 1997."

The absence of any allegation that Second Genesis was directed to perform, and any allegation that the District accepted services, precludes finding an implied-in-fact contract.

VII. There has been no good faith and innocent reliance on a contract later determined to be void

In addition to jurisdiction to consider claims arising out of valid contracts, pursuant to D.C. Code §1182.5(d)(2), this Board has jurisdiction over certain claims arising out of contracts entered into in good faith, but later determined to be void *ab initio*. *S.W. Imaging, Inc.*, CAB No. D-806, Jan. 23, 1992, 39 D.C. Reg. 4393, 4398. Section 1-1182.5(d) provides:

> (1) Except as otherwise provided in this chapter, a contract which is entered into in violation of this chapter or the rules and regulations issued pursuant to this chapter is void, unless it is determined in a proceeding pursuant to this chapter or subsequent judicial review that good faith has been shown by all parties, and there has been substantial compliance with the provisions of the chapter and the rules and regulations.
>
> (2) If a contract is void, a contractor who has entered into the contract in good faith, without directly contributing to a violation and without knowledge of any violation of the chapter or rules and regulations prior to the awarding of the contract, shall be compensated for costs actually incurred.

Jurisdiction pursuant to this section requires that the appellant "has entered into a contract" which is later determined to be void. For the reasons discussed above, we conclude that the parties

never entered into a contract. Because the parties did not enter into a contract, section 1-1182.5(d) is inapplicable.[8]

The District is not estopped from denying that a contract exists

The Complaint seeks to avoid the consequences of the absence of a contract by asserting in Count II that the "District should be equitably estopped from claiming that no contract exists since the conduct of the District during the course of negotiations, and thereafter, could foreseeably induce, and in fact did induce, Second Genesis to change is position in reliance on the District's promises. ¶39. Regardless of the good faith of the Appellant and its dedication to serving the needs of the District, the doctrine of equitable estoppel does not apply to the government if its agents are without lawful authority to enter into the contract. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947). "The doctrine of equitable estoppel, if applicable against the government at all, *Gropp v. D.C. Board of Dentistry*, 606 A.2d 1010, 1016 (DC 1992), may be invoked only 'where there is a showing of some type of 'affirmative misconduct' by a government agent.' *Id.* (quoting *Schweiker v. Hansen*, 450 U.S. 785, 788-90, 101 S.Ct. 1468, 1470-72, 67 L.Ed.2d 685 (1981); other citations omitted)." *Robinson v. Smith*, 683 A.2d 481, 492-3 (D.C. 1996).

Conclusion

Reading the allegations of the Complaint most favorably to the Appellant, the Board concludes that the Complaint alleges no facts which could support a finding that Second Genesis and the District ever entered into a contract. In the absence of any contract, even a contract later determined to be void, this Board is without jurisdiction. Although the alleged conduct of the District indicates that the agency expected Second Genesis to prepare to perform the contract and to acquire and reserve resources, no written contract was executed, critical terms essential to a contract were never agreed to, and mandatory approvals were not obtained. While business judgment may lead a contractor to incur cost so as to be ready to perform if and when the District awards a contract, if the District does not direct the performance and does not accept benefits from the preparations, such activities are initiated or performed at the risk of the Appellant until a District official with authority to bind the District executes the written contract. Unless a contract can be proved, this Board is without jurisdiction to hear any appeal.

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[8] Even if we could conclude that section 1-1182.5(d) was applicable, Appellant fails to meet the criterion of subsection (d)(2) that it be "without knowledge of any violation of the chapter or rules and regulations prior to awarding the contract." Appellant was specifically on notice that approval of the Control Board was required prior to award. In the face of the specific notice of the requirement of approval by the Control Board, unless Appellant had reason to believe that the Control Board had approved the contract, which is not alleged, Appellant could only have reasonably assumed that award was in violation of procurement procedures.

The District's Motion to Dismiss is **GRANTED**. Appellant's Complaint is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

DATED: February 4, 2000

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

JONATHAN D. ZISCHKAU
Administrative Judge