UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: June 15, 2010

CBCA 1165

ENGAGE LEARNING, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Ellis B. Freatman, III and Virginia A. Cardwell of Roberts & Freatman, Ypsilanti, MI, counsel for Appellant.

Emily E. Parkhurst, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **HYATT**, and **KULLBERG**.

**HYATT**, Board Judge.

Appellant, Engage Learning, Inc. (Engage Learning), has appealed the denial of its claim for payment for consulting services provided to respondent, the Department of the Interior, Bureau of Indian Affairs (BIA). Respondent moves to dismiss the appeal on the grounds that (1) the Board lacks subject matter jurisdiction and (2) the complaint fails to state a claim for which relief may be granted by this Board. Alternatively, respondent seeks summary relief on the ground that the material facts are not in dispute and the Government

is entitled to prevail as a matter of law. For the reasons discussed below, the motion to dismiss for lack of jurisdiction is granted.

## Background

1. Engage Learning is a small company that provides professional training, curriculum development, and technical assistance services to schools, teachers, and administrators. Engage Learning's services focus on raising the academic achievement of students in kindergarten through grade twelve. Complaint ¶ 12.

2. Engage Learning, together with its predecessor, Johnston Consulting, has provided professional training and technical assistance services to schools operated by the BIA since 2001. Most of these services have been provided in conjunction with goals enunciated in the BIA's Family and Child Education (FACE) program.[1] Engage Learning and BIA have done approximately $4.1 million of continuous business together. Complaint ¶ 18; Affidavit of Diana Jo Johnston (Feb. 8, 2009) ¶ 7.

3. On August 8, 2002, BIA awarded purchase order SMK0E020259 (PO 20259) to Engage Learning. Under this order, Engage Learning was to provide a five-day teacher implementation training program and to support teachers in the child centered learning approach through site visits at BIA schools in connection with the FACE K-3 Literacy Model. Appeal File, Exhibit 1.

4. PO 20259 was a sole-source contract awarded pursuant to the simplified acquisition procedures under the Federal Acquisition Regulation (FAR). The contract was awarded for the amount of $66,480. Of that amount, $30,480 was allocated for the five-day training and $36,000 was allocated for the site visits. The period of performance provided for the training was August 5 - 9, 2002, and the period of performance planned for the site visits was August 12, 2002, through June 30, 2003, with the overall period of performance provided for under the contract from August 5, 2002, through June 30, 2003. Appeal File, Exhibit 1.

5. By September 20, 2002, Engage Learning had fully performed the work under PO 20259, completing both the five-day training and the site visits.

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[1] FACE was initiated by BIA in 1990 for the purpose of promoting family literacy. The program seeks to narrow achievement gaps for American Indian children located primarily on rural reservations and to better prepare them for school. *See* http://www.bie.edu.

6. Aside from the site visits and training performed under PO 20259, the Indian Education program office identified a large quantity of site visits and training services that it wanted Engage Learning to provide. Between October 1 and November 22, 2002, Engage Learning provided specific training and technical assistance services to fourteen schools in the FACE program. Complaint ¶¶ 21, 25. In all, Engage Learning provided consulting services totaling $462,052.20, most of which was paid for with funds provided directly to the schools by the Special Assistant to the Director, Office of Indian Affairs. The amount of $80,485 is all that remains unpaid for these services. Affidavit of Lana Shaughnessy (Feb. 3, 2009) ¶¶ 8-9; *see* Appeal File, Exhibit 10.[2]

7. On December 18, 2002, Amendment 1 was issued to change the accounting code for PO 20259; the amendment did not change or in any way affect the work or dollar amount of PO 20259. Appeal File, Exhibit 7 at 39.

8. For the periods from March 1-4, 2004 and April 5-7, 2004, Engage Learning provided services to the Cottonwood Day School in Chinle, Arizona. Complaint ¶ 28. These services were requested by the principal of Cottonwood Day School, Esther Frejo. Supplemental Appeal File, Exhibit 30. Engage Learning submitted invoices in the amount of $11,500 to BIA for payment of the professional training services it provided. Complaint ¶ 29. No purchase order was issued by BIA for these services nor was PO 20259 amended to include these services.

9. On July 24, 2004, the contracting officer, Keith King, sent a letter to Ms. Johnston, the President and Chief Executive Officer (CEO) of Engage Learning, addressing appellant's request to be paid for invoices totaling $80,485. Appeal File, Exhibit 10 at 45. The contracting officer advised that based on his review of the matter, the unpaid invoices

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[2] In a letter dated July 24, 2004, set forth in the Appeal File at Exhibit 10, the contracting officer expressed his view about this situation:

> It appears that in order to circumvent having to work through the OIEP Contracting Officer to get a contract in place for these services, Ms. Shaughnessy sent funds directly to the schools to pay for the services and scheduled services to be performed at these schools knowing that there was not a contract in place. Additionally, it appears that Ms. Johnston of Engage Learning performed these services knowing full well that a contract was not in place authoriz[ing] these services to be performed.

resulted from an "unauthorized commitment, made by a Government employee who did not have authority to enter into an agreement on behalf of the Government." He also concluded that the unauthorized obligations were not subject to ratification procedures because: (1) a resulting contract would not otherwise have been proper if made by an appropriate contracting officer; (2) the contracting officer could not determine that the prices were fair and reasonable; and (3) ratification would be used in a manner that encourages such commitments being made by government personnel. *Id.* Mr. King further stated that he had told both the Office of Indian Education Programs and the contractor that no contract was in place for these services and that until a contract was in place, the services should not be provided. *Id.* at 46.

10. The contracting officer's comment, in the letter dated July 24, 2004, to the fact that he had notified both Ms. Shaughnessy and Ms. Johnston that no contract was in place for the services in question refers to an October 4, 2002, conversation recorded in a memorandum authored by Mr. King and addressed to Ms. Shaughnessy, then the Special Assistant to the Director of the Office of Indian Affairs.[3] Mr. King confirms in the memorandum that he spoke to Ms. Johnston, apprising her of the fact that there was no contract in place for the site visits she was planning to start the following week. The memorandum also states that Mr. King informed Ms. Johnston that he had no authority to authorize the work to begin, particularly because the BIA Competition Advocate had not yet approved the Justification for Other than Full and Open Competition. Appeal File, Exhibit 14 at 109. The contracting officer is now deceased and cannot attest to the events described in the memorandum.

11. Ms. Johnston refutes the contracting officer's description of the conversation that Mr. King states occurred on October 4, 2002, prior to services being rendered. She maintains that she did not speak with the contracting officer and that she was not advised of his concerns. She avers that:

> 2. The statement that I was informed by BIA contracting officer Keith King on October 4, 2002, that there was not a contract in place for the site visits I was planning to start the following week, is false. Keith King did not make that statement to me on or near October 4, 2002.

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[3] The Government requested leave to supplement the appeal file with this memorandum, which was not in the contract files when the appeal was filed. Thereafter, a copy of the memorandum was located in files in the Office of the Inspector General. The Government's request to include the document in the Appeal File as Exhibit 14 is granted.

> 3. The statement that: "Mr. King informed Ms. Johnston that he did not have the authority to authorize work to begin until the BIA Competition Advocate approves the Justification for Other than Full and Open Competition" is false. Mr. King did not make that statement to me on or near October 4, 2002.
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> 4. The statement that "Mr. King informed Ms. Johnston that no work could be done at that time" is false. Keith King did not make that statement to me on or near October 4, 2002.

Johnston Affidavit ¶¶ 2-4.

12. Appellant also submits an affidavit executed by Lana Shaughnessy, the former Special Assistant to the Director of the Office of Indian Affairs. With respect to the issues raised in this appeal, Ms. Shaughnessy attests as follows:

> 2. Engage Learning, Inc. was selected to be the K-3 service provider for the Bureau of Indian Affairs FACE . . . program contract.
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> 3. During the 2002 to 2003 school year, the Bureau of Indian Affairs selected Engage Learning to provide four site visits each to thirty-two different Indian schools.
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> 4. The wide range of services contracted for included intensive, one-on-one professional development training, instruction and support services to teachers and administrators inside classrooms and school offices.
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> 5. I directed Engage Learning to provide these services.
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> 6. I was the contracting officer representative and I had the authority to authorize and approve work performed by Engage Learning.

Shaughnessy Affidavit ¶¶ 2-6. Ms. Shaughnessy also avers that thirty-four site visits were provided by appellant between October and December 2002 and that the schools were provided with funds distribution documents and directed by Ms. Shaughnessy to use the money to pay for FACE visits for that time period. She further asserts that she "had the authority to direct the schools to contract for these services and to bind the Government in

that commitment." Finally, Ms. Shaughnessy states that out of a total of $462,052.20 in services performed and invoiced by Engage Learning, the amount of $80,485 is the only unpaid balance. *Id.* ¶¶ 8-9.

13. A third affidavit, executed by the Vice President of Engage Learning, states that "Keith King gave verbal authority to conduct four site support visits each to thirty-two different Indian schools during the 2002 to 2003 school year." Affidavit of Heather L. Johnson (Feb. 10, 2009) ¶ 2.

14. A memorandum dated July 2, 2002, from the Director of the Office of Indian Education Programs to education line officers, addresses the authority of a supervisor of a Bureau-operated school to order materials, supplies, equipment, operation services, maintenance services, and other services for the school, for an aggregate amount not to exceed $50,000, and without competitive bidding if:

(i) the cost for any single item acquired does not exceed $15,000;

(ii) the school board approves the acquisition;

(iii) the supervisor certifies that the cost is fair and reasonable;

(iv) the documents relating to the acquisition executed by the supervisor or other school staff cite this paragraph as authority for the acquisition; and

(v) the acquisition transaction is documented in a journal maintained at the school that clearly identifies when the transaction occurred, the item that was acquired and from whom, the price paid, the quantities acquired, and any other information the supervisor of the school board considers to be relevant.

This authority is provided under the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002), generally codified at 20 U.S.C. §§ 6301-6578 (2006). The memorandum cautioned that no funds may be used from the school's operation and maintenance, Department of Education, or other Federal funds as part of the $50,000 until a solicitor's opinion is received on the appropriateness of the use of those funds for non-competitive procurement. Supplemental Appeal File, Exhibit 2.

15. On November 28, 2007, Engage Learning submitted a claim for delayed payment on the same invoices addressed in the contracting officer's July 24, 2004, letter in

the amount of $80,485 as well as an additional invoice for $11,500 for work performed between March 1-4, 2004 and April 5-7, 2004. This claim included Prompt Payment Act interest. The BIA responded by letter on March 5, 2008, stating that it stood by the position taken by the contracting officer in the July 24, 2004, letter. Appeal File, Exhibit 12 at 73-74. On June 19, 2008, Engage Learning elected to file its notice of appeal with the Civilian Board of Contract Appeals. Engage Learning pointed out in its notice of appeal that the March 5 letter did not contain language, required by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2006), that would cause the letter to qualify as a final decision.

## Discussion

Engage Learning characterizes its appeal as one based on breach of contract for failure to pay for services that Engage Learning provided to BIA in 2002 and 2004. The Government argues that the appeal can be resolved summarily for several reasons: (1) the Board lacks jurisdiction because the services were not provided pursuant to either an express or an implied-in-fact contract; (2) Engage Learning failed to state a claim for which relief can be granted; and (3) no material facts are in dispute and the Government is entitled to prevail as a matter of law.

### The Board's Jurisdiction Under the CDA

BIA's motion to dismiss for lack of subject matter jurisdiction raises a threshold matter which must be resolved before addressing alternative motions. Appellant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988); *801 Market Street Holdings, L.P. v. General Services Administration*, CBCA 425, 08-1 BCA ¶ 33,853. In assessing whether the Board has subject matter jurisdiction, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *accord Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989); *CACI, INC.-FEDERAL v. General Services Administration*, GSBCA 15588, 02-1 BCA ¶ 31,712, at 156,635 (2001). When a motion to dismiss for lack of subject matter jurisdiction challenges the truth of alleged jurisdictional facts, the Board may consider relevant evidence beyond the pleadings to resolve disputed facts. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993); *B&M Cillessen Construction Co. v. Department of Health and Human Services*, CBCA 931, 08-1 BCA ¶ 33,753 (2007); *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685.

The Board's jurisdiction under the CDA is defined as follows:

> Unless otherwise specified herein, this chapter applies to any express or implied contract . . . entered into by an executive agency for
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> > (1) the procurement of property, other than real property in being;
> >
> > (2) the procurement of services;
> >
> > (3) the procurement of construction, alteration, repair or maintenance of real property; or
> >
> > (4) the disposal of personal property.

41 U.S.C. § 602(a); *see also Opportunities for the Aging Housing Corp. v. Department of Housing and Urban Development*, CBCA 1501, 10-1 BCA ¶ 34,311 (2009); *Petersen Equipment Fire & Emergency Services v. Department of the Interior*, CBCA 185-R, et al., 08-2 BCA ¶ 33,939; *All Star Metals, LLC v. Department of Transportation*, CBCA 91, 07-1 BCA ¶ 33,562. The term "implied contract" under the CDA refers only to contracts implied in fact; the Board has no jurisdiction with respect to contracts implied at law. *See Angel Menendez Environmental Services, Inc. v. Department of Veterans Affairs*, CBCA 19, et al., 08-1 BCA ¶ 33,731, at 167,005 (2007) (citing *Means Co.*, AGBCA 95-182-1, 95-2 BCA ¶ 27,837); *Guilltone Properties, Inc.*, HUD BCA 02-C-103-C4, 06-1 BCA ¶ 33,249; *accord Altanmia Commercial Marketing Co.*, ASBCA 55393, 09-1 BCA ¶ 34,095. *See generally Hercules, Inc. v. United States*, 516 U.S. 417, 423-24 (1996).

BIA contends that the Board lacks jurisdiction over this appeal because Engage Learning had no express or implied contract with the Government for the services for which it was not paid. In its opposition to respondent's motion to dismiss for lack of jurisdiction, appellant maintains that it in fact had "an express contract for some of the work performed, and clear and unambiguous implied-in-fact contracts for all of the other work for which payment is now sought." Engage Learning's complaint references PO 20259 and requisition K00E202270.

Express Contract

For the time frame in issue, the only express contract for Engage Learning's services was PO 20259. The site visits and other services totaling $80,485 were performed by Engage Learning at locations different from those covered by PO 20259. PO 20259 was awarded

non-competitively under simplified acquisition procedures. The award was for specified services in the amount of $66,480, and the only amendment to the purchase order did not change that amount. Findings 4, 7; Appeal File, Exhibit 7 at 39.

The invoiced work for which appellant seeks compensation is for the site visits referred to above, in the amount of $80,485, and for the work at Cottonwood Day School, for the amount of $11,500. Findings 6-7. The combined invoices represent a total of $91,985, an amount that respondent points out could not have been added to this purchase order specifically because it would have increased the value of the purchase order above the simplified acquisition threshold of $100,000 established in the FAR. *See* 48 CFR 2.101 and Part 13 (2002). Additionally, a portion of the invoiced work was performed outside the period of performance of PO 20259. Appeal File, Exhibit 1 at 1; Finding 8. The particular services ordered under PO 20259 were fully performed by Engage Learning as of September 20, 2002, and were paid for in full.

Appellant argues that Ms. Shaughnessy intended that the contract for site visits would be much more inclusive than the work included in PO 20259 and that she attempted to rectify the amount of the purchase order to encompass a much larger volume of work anticipated to be ordered. This is reflected in requisition K00E202270, comprised of two documents styled as amendments 1 and 2 to PO 20259, adding numerous site visits and other services to be provided by Engage Learning. These documents are signed by Lana Shaughnessy and by the Director of the Office of Indian Education Programs. They are not signed by any BIA contracting officer, however, and appear to be simply requisitions for work that Ms. Shaughnessy wanted to order.[4] Supplemental Appeal File, Exhibit 5. These requisitions are internal documents requesting that a contract or contracts be issued and do not rise to the level of an express contract. Thus, these documents are not evidence that an express contract was executed for this work, or that PO 20259 in any way included this additional work. Appellant has not produced any document showing that a contracting officer ever included the invoiced work in a contract. On the record provided, the express contract covered only the limited site visits and consulting services enumerated in that order and was never expanded to cover any further services. Appellant has not met its burden to demonstrate that an express contract covered all or any part of the work at issue.

Implied-in-Fact Contract

[4] Ms. Shaughnessy had funding for the work, which she distributed to the schools slated for site visits and other consulting services. Most of the work ordered was ultimately paid for. The services forming the subject of this dispute, however, were not paid for. Finding 8.

Although PO 20259 does not cover the actual services for which appellant seeks compensation, this express contract does not serve as an impediment to appellant's alternative argument, that there was an implied-in-fact contract under which it is entitled to recover. *See Trauma Service Group v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997); *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990); *JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309.

To defeat respondent's motion to dismiss for lack of jurisdiction, appellant must meet its burden to adduce facts that, if proven, would support a finding that an implied-in-fact contract was created by the parties for the work at issue. Thus, Engage Learning must allege facts sufficient to show: (1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance; and (4) that the government representative whose conduct is relied upon had actual authority to bind the Government in contract. *E.g.*, *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc); *Lewis v. United States*, 70 F.3d 597, 600 (Fed. Cir. 1995); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990); *Southwestern Security Services, Inc. v. Department of Homeland Security*, CBCA 1264, 09-2 BCA ¶ 34,139.

Assuming, without deciding, that Engage Learning has, through its dealings with Ms. Shaughnessy, alleged sufficient facts to establish the first three elements of an implied-in-fact contract, appellant must also show that the agency employee on whose conduct it relies had actual, not merely apparent, authority to bind the Government. *See Tolano Anderson Contracting v. Department of Veterans Affairs*, CBCA 1312, 10-1 BCA ¶ 34,398, at 169,850 (citing *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984)); *Inter-Tribal Council of Nevada, Inc.*, IBCA 1234-12-78, 83-1 BCA ¶ 16,433.

By law, contracts may be entered into and signed on behalf of the Government only by contracting officers. 48 CFR 1.601(a); *Flexflab, L.L.C. v. United States*, 424 F.3d 1254, 1260 (Fed. Cir. 2005); *Corners and Edges, Inc. v. Department of Health and Human Services*, CBCA 648, 07-2 BCA ¶ 33,706. The term "contracting officer" is defined as follows:

> Contracting Officer means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

48 CFR 2.101. The FAR does not define the term "contracting officer's representative" (COR).

The record identifies only two contracting officers with authority to bind BIA for the work in question – the contracting officer who signed PO 20259 and Keith King. The purchase order also incorporates by reference FAR 52.202-1, "Definitions," which states that words or terms in the contract have the same meaning as the definitions in FAR 2.101. No relevant statutes or regulations delegate contracting authority to a COR. The purchase order does not mention a COR or other representative with any authority to bind the Government under contract. There are no documents in the record showing that a contracting officer delegated any authority to a COR or other employee with administrative responsibilities for any of the work performed by Engage Learning.

Appellant's complaint does not identify an individual who authorized the invoiced work. It simply alleges that appellant performed the work at the direction of the Government. Complaint ¶ 44. In her affidavit, Ms. Shaughnessy asserts that she directed appellant to perform the work and that, as COR, she had actual authority to do so. Finding 12. Other than Ms. Shaughnessy's declaration to that effect, there is nothing to corroborate that she was properly assuming the role of COR, and nothing in writing to suggest that she could bind the Government in contract. Ms. Shaughnessy's position and job title within BIA, Special Assistant to the Director of Indian Education Programs, would not ordinarily suggest that she would have contracting responsibilities or authority. *See D&F Marketing, Inc.*, ASBCA 56043, 09-1 BCA ¶ 34,108. Appellant has not offered sufficient evidence to support its contention that Ms. Shaughnessy had actual authority to bind the Government to contract for the services in question.

It appears from her affidavit that Ms. Shaughnessy genuinely, but erroneously, believed that she was acting within the scope of her authority. The legal theory of apparent authority, however, does not serve to create a binding agreement vis-a-vis the Government in the absence of actual or implied authority to do so. Even when an employee is unaware of, or is mistaken about, the scope of his or her authority to bind the Government, it is ultimately incumbent upon the contractor to ascertain the extent of and limits upon the employee's authority. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *California Business Telephones v. Department of Agriculture*, CBCA 135, 07-1 BCA ¶ 33,553.

The contracting officer's memorandum to Lana Shaughnessy memorializing a conversation that he said took place on October 4, 2002, between the Government's contracting officer and appellant's CEO, is the subject of a factual dispute. Appeal File, Exhibit 14. Appellant denies that this conversation took place as stated in that memorandum.

Finding 12. In the statement of genuine issues provided by appellant in opposition to respondent's motion to dismiss, appellant asserts that had it been "informed that the planned work was unauthorized and should not be performed, Engage Learning would not have performed the services in question."

For purposes of resolving this motion, whether or not the Government's contracting officer expressly notified the contractor that no contract was in place and that the planned commitments were unauthorized is not dispositive for purposes of establishing actual authority. The contracting officer had no duty to inform Engage Learning that the planned commitment was unauthorized. Rather, the burden rested with the contractor to determine that the official ordering work had the requisite authority to obligate the Government to pay for that work. This rule is of long-standing tenure. Anyone who enters an arrangement with the Government has the duty to accurately ascertain that the contract was properly formed and binding as to its terms. *See, e.g.*, *Federal Crop Insurance Corp.*, 332 U.S. at 380; *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1360-61 (Fed. Cir. 2001); *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998). Thus, even if the conversation Mr. King memorialized as having taken place on October 4, 2002, did not take place, it was still appellant's responsibility to verify Ms. Shaughnessy's authority to contract on behalf of BIA.

Another factual dispute is arguably created by appellant in the affidavit of its executive vice president, Heather Johnson, who attested that "Keith King gave verbal authority to conduct four site support visits each to thirty-two different Indian schools during the 2002 to 2003 school year." Ms. Johnson's affidavit, while declaring that Mr. King, a contracting officer, gave verbal authority for site visits, provides no context to this alleged statement of the contracting officer, which flatly contradicts the statements made in his July 24, 2004, letter and in the October 4, 2002, memorandum. This carefully worded sentence includes none of the information that would ordinarily be expected to be offered -- such as when and to whom Mr. King made this representation. There are no contemporaneous documents memorializing what should ordinarily be considered by the contractor to be an important statement. Finally, we note that while counsel for appellant makes a passing reference to Ms. Johnson's affidavit in the background section of appellant's opposition to respondent's motions, there is no mention of the affidavit anywhere in the sections of the brief arguing that an implied-in-fact contract was created, although the affidavits of Ms. Shaughnessy and appellant's CEO, Ms. Johnston, are discussed extensively. Given the ambiguity of the statement by Ms. Johnson, we conclude that it does not suffice, by itself or in conjunction with other evidence provided by appellant, to meet appellant's burden to establish that the contracting officer obligated the Government to pay for this work.

Delegation of Contracting Authority Under the No Child Left Behind Act

Finally, appellant has identified another potential source of contractual authority to bind the Government for the services provided to Cottonwood Day School. Between March 1-4, 2004 and April 5-7, 2004, Engage Learning provided services to the Cottonwood Day School in Chinle, Arizona. Finding 14. Thereafter, Engage Learning submitted invoices in the amount of $11,500 to BIA for payment. *Id.* In its opposition to respondent's motion to dismiss, appellant asserts out that the principal of Cottonwood Day School signed a contract with authority from the school board for site support visits by appellant in March and April of 2004. However, the purported contract appellant relies on is not a contract but merely an invitation from the principal for appellant to make two site visits. Supplemental Appeal File, Exhibit 30. Furthermore, appellant fails to show that the requisite conditions of contracting authority were met. The allegation that she had actual authority rests solely on the No Child Left Behind Act of 2001 and BIA's implementing memorandum. Pursuant to BIA's memorandum, the principal had authority to bind the Government in contract only if she met several conditions including, but not limited to, school board approval of the acquisition and certification by the principal that the cost was fair and reasonable Finding 14. Appellant has not alleged or produced any documents that would indicate that school board approval was obtained, nor has it shown that the school officials made a finding that the cost of the site visits or other services would be fair and reasonable. Thus, appellant has not adduced sufficient evidence to support its contention that the principal of Cottonwood Day School had actual authority to bind the Government in contract under the cited delegation of authority. Again, it was appellant's responsibility to verify that Ms. Frejo was authorized to contract for the services provided.

Appellant has failed to meet its burden to allege sufficient facts to enable us to find that an express or implied contract existed with respect to the invoiced work at issue in this appeal. In fact, the record clearly shows that no government contracting officer authorized or ordered the invoiced work and no government contracting officer ratified the invoiced work after it had been performed. Since the Board lacks jurisdiction over this appeal, we do not address respondent's alternative motions.

## Decision

Respondent's motion to dismiss for lack of jurisdiction is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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CATHERINE B. HYATT
Board Judge

We concur:

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JAMES L. STERN
Board Judge

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H. CHUCK KULLBERG
Board Judge