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Ridge Runner Forestry v. Veneman, 287 F.3d 1058 (Fed. Cir. 2002)

Ridge Runner Forestry is a fire protection company located in the Pacific Northwest. In response to a request for quotations ("RFQ") issued by the Forestry Service, Ridge Runner submitted a proposal and ultimately signed a document entitled Pacific Northwest Interagency Engine Tender Agreement ("Tender Agreement"). The Tender Agreement incorporated the RFQ in its entirety, including the following two provisions in bold faced lettering: (1) "Award of an Interagency Equipment Rental Agreement based on response to this Request for Quotations (RFQ) does not preclude the Government from using any agency or cooperator or local EERA resources"; and (2) "Award of an Interagency Equipment Rental Agreement does not guarantee there will be a need for the equipment offered nor does it guarantee orders will be placed against the awarded agreements." *Request for Quotation,* No. R6–99–117 (March 29, 1999). Additionally, because the government could not foresee its actual equipment needs, the RFQ contained language that allowed the contractor to decline the government's request for equipment for any reason: "Because the equipment needs of the government and availability of contractor's equipment during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the government, the contractor shall furnish the equipment offered herein *to the extent the contractor is willing and able at the time of order.*" *Id.* (emphasis added). The RFQ also included a clause informing bidders that they would not be reimbursed for any costs incurred in submitting a quotation. Ridge Runner signed Tender Agreements in 1996, 1997, 1998, and 1999. In 1999, it presented a claim for $180,000 to the contracting officer alleging that the Forestry Service had violated an "implied duty of good faith and fair dealing" because Ridge Runner had been "systematically excluded for the past several years from providing services to the Government." In response, the contracting officer told Ridge Runner that she lacked the proper authority to decide the claim. Ridge Runner timely appealed the decision to the Department of Agriculture Board of Contract Appeals. The board granted the government's motion to dismiss concluding that because no contract had been entered into, it lacked jurisdiction under the Contract Disputes Act ("CDA").

Discussion

"To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation ... and sufficient definiteness so as to 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.' " "To constitute consideration, a performance or a return promise must be bargained for." *Restatement (Second) of Contracts* § 71(1) (1979). And the "promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances...." *Id.* § 77.

Ridge Runner argues that the Tender Agreement was a binding contract that placed specific obligations upon the government; namely, the government was obligated to call upon Ridge Runner, and the other winning vendors, for its fire fighting needs, and in return, the vendors were to remain ready with acceptable equipment and trained staff to answer the government's call. This, Ridge Runner argues, places the alleged contract squarely within our holding in *Ace–Federal,* 226 F.3d 1329.

Ace–Federal involved a requirements contract whereby the government was obligated to use, with limited exceptions, enumerated suppliers. Following a request for proposals, Ace Federal, as well as other vendors, contracted with the government to provide court reporting and transcription services for various federal agencies. Included in each of the contracts was

the standard requirements clause found in Federal Acquisition Regulation § 52.216–21(c) which provides "[e]xcept as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule." 48 C.F.R. § 52.216–21(c) (1988). Each contract also included a termination for convenience clause that limited government liability should the General Services Administration ("GSA") choose to cancel any contract. During the relevant term, some of the covered agencies contracted for transcription services from non-contract sources without obtaining the necessary waiver. We held that "each time an agency that did not obtain a GSA waiver arranged for services covered under the contract from a non-contract source, the government did not act within the limited exception and breached the contract.".

The contract in *Ace–Federal* is quite distinct from the Tender Agreements at issue in this case. That contract obligated the government to fulfill all of its requirements for transcription services from enumerated vendors or obtain a waiver. The Tender Agreements here are nothing but illusory promises. By the phrase illusory promise is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all. *Torncello v. United States,* 231 Ct.Cl. 20, 681 F.2d 756, 769 (1982) (quoting 1 *Corbin on Contracts* § 145 (1963)). The government had the option of attempting to obtain firefighting services from Ridge Runner or any other source, regardless of whether that source had signed a tender agreement. The Agreements contained no clause limiting the government's options for firefighting services; the government merely "promised" to consider using Ridge Runner for firefighting services. Also, the Tender Agreement placed no obligation upon Ridge Runner. If the government came calling, Ridge Runner "promised" to provide the requested equipment only if it was "willing and able." It is axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less illusory promises of both parties.

Conclusion

Accordingly, the decision of the Department of Agriculture Board of Contract Appeals is affirmed.

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392 F.3d 609 (Third Cir. 2004)
BAER v. CHASE

This matter comes on before this court on Robert V. Baer's ("Baer") appeal from an order of the district court entered February 20, 2004, granting summary judgment to the defendants, David Chase and DC Enterprises, Inc. (together called "Chase"). This dispute centers on the creation and development of the well-known television series, The Sopranos. Through this action, Baer seeks compensation for what he perceives was his role in the creation and development of the television series.

I. FACTUAL AND PROCEDURAL HISTORY

Chase is the creator, producer, writer and director of The Sopranos. Chase has numerous credits for other television productions as well. Before Chase met Baer, Chase had worked on a number of projects involving organized crime activities based in New Jersey, including a script for "a mob boss in therapy," a concept that, in part, would become the basis for The Sopranos.

In 1995, Chase was producing and directing a Rockford Files "movie-of-the-week" when he met Joseph Urbancyk who was working on the set as a camera operator and temporary director of photography. Chase mentioned to Urbancyk that he was looking for new material and for writers who could develop feature film screenplays that Chase later might re-write and direct. Urbancyk also overheard Chase say that the creators of The Rockford Files were looking to assign additional writers for their "movie of the week" project.

Urbancyk became the connection between Chase and Baer as a result of Urbancyk's long-time friendship with Baer and his knowledge of Baer's interest in pursuing a career in writing, directing and producing. Baer, who was a New Jersey attorney, recently had left his employment in the Union County Prosecutor's Office in Elizabeth, New Jersey, where he had worked for the previous six years. Urbancyk urged Baer to write a script for The Rockford Files. Baer did so and gave it to Urbancyk who passed it on to Chase. Chase considered Baer's work "interesting" and asked Urbancyk if Baer had any plans to be in Los Angeles. Upon hearing of Chase's interest, Baer flew to Los Angeles to meet with Chase.

Chase, Urbancyk and Baer met for lunch on June 20, 1995. At that time Chase informed Baer that he would be unable to use Baer's screenplay, as the remaining slots in The Rockford Files had been filled. The lunch continued, however, with Baer describing his experience as a prosecutor. Baer also pitched the idea to shoot "a film or television shows about the New Jersey Mafia." At that time Baer was unaware of Chase's previous work involving mob activity premised in New Jersey. At the lunch there was no reference to any payment that Chase might make to Baer for the latter's services and the parties agree that they did not reach any agreement on that day.

In October 1995, Chase visited New Jersey for three days. During this "research visit" Baer arranged meetings for Chase with Detective Thomas Koczur, Detective Robert A. Jones, and Tony Spirito who provided Chase with information, material and personal stories about their experiences with organized crime. Koczur served as a tour guide and drove Chase and Baer to various locations in northern New Jersey. Koczur also arranged a lunch between Chase and Spirito. Spirito told true and sometimes personal stories involving loan sharking, a power struggle with two uncles involving a family business, and two individuals, Big Pussy and Little Pussy Russo. Chase also met with Jones, a detective with the Union County Prosecutor's office who had experience investigating organized crime. Baer does not dispute that virtually all of the ideas and locations that he "contributed" to Chase existed in the public record. These or similar story lines and characters have appeared in episodes of The Sopranos.

After returning to Los Angeles, Chase sent Baer a copy of a draft of a Sopranos screenplay that he had written, which was dated December 20, 1995. Baer asserts that after he read it he called Chase and made various comments with regard to it. Baer claims that the two spoke at least four times during the following year and that he sent a letter to Chase dated February 10, 1997, discussing The Sopranos script. Baer ensured that Chase received the letter by confirming its arrival with Chase's assistant. On this appeal we accept Baer's allegations regarding his input into The Sopranos draft.

Notwithstanding his February 10, 1997 letter, at his deposition Baer claimed that he last rendered services to Chase in 1995. Thus, Baer's testimony included the following:

> Q. During any of those conversations after October of 1995, [when Chase visited New Jersey] did you provide any further information to Mr. Chase other than in relation to the sexual assault?
> A. Not really.

Q. No?
A. Not really. The screen play was done and there wasn't really any need for it at that point as far as I knew.
Q. So everything that you had done and to which you claim entitlement was done by the end of October 1995?
A. Yes in terms of assisting him in helping with this project that would be true.

Notwithstanding this testimony, in Baer's later certification dated October 3, 2003, in opposition to Chase's motion for summary judgment he sought to clarify his deposition testimony, stating:

> I also sent him a letter dated February 10, 1997 discussing the Sopranos script prior to making a trip to Los Angeles. After sending the letter, I spoke with Chase's assistant, Kelly Kockzak, who confirmed that Chase had received it. This letter represents the last services I provided to Defendants. Most of my services were provided in 1995.

Baer asserts that he and Chase orally agreed on three separate occasions that if the show became a success, Chase would "take care of" Baer, and "remunerate [Baer] in a manner commensurate to the true value of [his services]." According to Baer, he and Chase first made this oral agreement on the telephone during one of their first two or three conversations during the summer of 1995. The second occasion was on the telephone and occurred immediately prior to Chase's October 1995 visit to New Jersey. The third time the parties reached the agreement was in person when they met in New Jersey in October 1995.

Baer claims that on each of these occasions the parties had the same conversation in which Chase offered to pay Baer, stating "you help me; I pay you." Baer always rejected Chase's offer, reasoning that Chase would be unable to pay him "for the true value of the services [Baer] was rendering." Id. Each time Baer rejected Chase's offer he did so with a counteroffer, "that I would perform the services while assuming the risk that if the show failed [Chase] would owe me nothing. If, however, the show succeeded he would remunerate me in a manner commensurate to the true value of my services." Baer acknowledges that this counteroffer, which in these proceedings we treat as having become the parties' agreement, always was oral and did not include any fixed term of duration or price. There is no other evidence in the record of any other discussion between Baer and Chase regarding the terms of the contract. For purposes of the motion for summary judgment, Chase accepts Baer's version of the events as true and thus concedes there was an oral agreement to the extent that Baer sets it forth. Notwithstanding this agreement, insofar as we can ascertain, other than Baer's calls to Chase after he received the Sopranos script, the next time Baer heard anything from or about Chase was when he received a phone call from Detective Koczur telling him that Chase was in Elizabeth shooting The Sopranos. In fact, Chase has not paid Baer for his services.

Baer's Implied-In-Fact Contract Claim

Baer predicates his contract claim on this appeal on an implied-in-fact contract rather than on the oral agreement he reached with Chase. The issue with respect to the implied-in-fact contract claim concerns whether Chase and Baer entered into an enforceable contract for services Baer rendered that aided in the creation and production of The Sopranos. In the district court Baer offered two alternative theories in which a purported contract was formed: the "oral agreement/success contingency" and an implied-in-fact contract.

The parties agree for purposes of the summary judgment motion that there was a contingent oral agreement providing for Chase to compensate Baer, depending on Chase's "success," in exchange for the aid Baer provided in the creation and production of The

Sopranos. As we noted above, the parties reached the oral agreement in three exchanges in which Baer proposed: "that I would perform the services while assuming the risk that if the show failed [Chase] would owe me nothing. If, however, the show succeeded he would remunerate me in a manner commensurate to the true value of my services." As we have indicated, for purposes of the summary judgment motion only, Chase accepts this version of the events so we will regard the existence of the oral agreement as not in dispute.

The district court held, and Baer concedes on appeal, that this oral agreement was "too vague to be enforced" as an express contract. This description of the oral agreement leaves at issue Baer's contention that the district court overlooked the existence of an enforceable implied-in-fact contract, rendering Chase liable for the services that Baer provided.

1. The Distinction Between Express And Implied-In-Fact Contracts

The distinction between express and implied contracts rests on alternative methods of contract formation. Contracts are "express" when the parties state their terms and "implied" when the parties do not state their terms. The distinction is based not on the contracts' legal effect but on the way the parties manifest their mutual assent. In re Penn. Cent. Transp. Co., 831 F.2d 1221, 1228 (3d Cir.1987) ("An implied-in-fact contract, therefore, is a true contract arising from mutual agreement and intent to promise, but in circumstances in which the agreement and promise have not been verbally expressed. The agreement is rather inferred from the conduct of the parties."). In other words, the terms "express" and "implied" do not denote different kinds of contracts, but rather reference the evidence by which the parties demonstrate their agreement.

Baer's attempt to find an implied-in-fact contract in his dealings with Chase does not strengthen his claim that Chase breached his contract with him. There is only one contract at issue, Chase's promise to compensate Baer for services he rendered which aided in the creation and production of The Sopranos. Chase's stipulation that there was such a contract has the consequence of making Baer's attempts to label this agreement "implied" rather than "express" to advance a distinction without a difference as the mode of contract formation, as we will explain, is immaterial to the disposition of the breach of contract claim. In other words, inasmuch as the parties agree for purposes of these summary judgment proceedings that there was an agreement, the manner in which they formed the contract is immaterial because different legal consequences do not flow from analyzing the alleged contract as implied-in-fact rather than express…. Moreover, Baer's claim of an implied-in-fact contract, in the face of an express agreement governing the same subject matter, is legally untenable. There cannot be an implied-in-fact contract if there is an express contract that covers the same subject matter. In other words, express contract and implied-in-fact contract theories are mutually exclusive…. The existence of an express contract, however, does not preclude the existence of an implied contract if the implied contract is distinct from the express contract.

Baer's alleged implied-in-fact contract, however, rather than being distinct from or unrelated to the express oral contract is identical to it. The stipulated oral agreement included Chase's promise to compensate Baer for the services and ideas that Baer provided Chase. …

2. Definitiveness As To Price and Duration In An "Idea Submission" Case

Even assuming that Baer had been able to demonstrate that he had an implied-in-fact contract with Chase, his contention that an implied-in-fact contract claim in an idea submission case need not be definite as to price and duration, would be incorrect. Baer asserts that the district court's holding "that the absence of a price and duration term render[s] an implied contract in an idea submission scenario too vague to be enforced ... is contrary to the law in virtually every jurisdiction that has ever considered the issue." …

In fact there are no distinctions in legal effect, at least in the context of this case, when a promise is implied rather than express. … We therefore determine if in any "idea submission

case," whether predicated on an express or implied contract, definiteness is a requirement to create an enforceable contract.

In fact "[a] contract arises from offer and acceptance, and must be sufficiently definite so 'that the performance to be rendered by each party can be ascertained with reasonable certainty.' " Therefore parties create an enforceable contract when they agree on its essential terms and manifest an intent that the terms bind them. If parties to an agreement do not agree on one or more essential terms of the purported agreement courts generally hold it to be unenforceable. New Jersey contract law focuses on the performance promised when analyzing an agreement to determine if it is too vague to be enforced. "An agreement so deficient in the specification of its essential terms that the performance by each party cannot be ascertained with reasonable certainty is not a contract, and clearly is not an enforceable one." A contract, therefore, is unenforceable for vagueness when its essential terms are too indefinite to allow a court to determine with reasonable certainty what each party has promised to do.

New Jersey law deems the price term, i.e., the amount of compensation, an essential term of any contract. An agreement lacking definiteness of price, however, is not unenforceable if the parties specify a practicable method by which they can determine the amount. However, in the absence of an agreement as to the manner or method of determining compensation the purported agreement is invalid. Additionally, the duration of the contract is deemed an essential term and therefore any agreement must be sufficiently definitive to allow a court to determine the agreed upon length of the contractual relationship. If possible, courts will "attach a sufficiently definite meaning to the terms of a bargain to make it enforceable[,]" Paley v. Barton Sav. and Loan Ass'n, 82 N.J.Super. 75, 196 A.2d 682, 686 (1964), and in doing so may refer to "commercial practice or other usage or custom." But the courts recognize that a contract is "unenforceable for vagueness when its terms are too indefinite to allow a court to determine with reasonable certainty what each party has promised to do."

Baer premises his argument on his view that New Jersey should disregard the well-established requirement of definiteness in its contract law when the subject-matter of the contract is an "idea submission." He cites extensively to a string of cases from various jurisdictions … Baer's argument is inaccurate and misleading. He attempts to transform cases where the issues raised pertain to adequacy of consideration and discrepancies over the use of submitted facts, into the proposition that implied-in-fact contracts involving idea submissions need not be sufficiently definite. For example: Wrench, 256 F.3d at 459-63, reversed a summary judgment disposition that held that novelty was required to prove consideration and sustain an implied-in-fact contract claim; Duffy, 123 F.Supp.2d at 816- 19, held that a plaintiff must prove that an idea disclosed to the defendant was novel in order to find consideration for the alleged contract and denied summary judgment because a material issue existed over novelty and use… New Jersey precedent does not support Baer's attempt to carve out an exception to traditional principles of contract law for submission-of-idea cases. The New Jersey courts have not provided even the slightest indication that they intend to depart from their well-established requirement that enforceability of a contract requires definiteness with respect to the essential terms of that contract. Accordingly, we will not relax the need for Baer to demonstrate definiteness as to price and duration with respect to the contract he entered into with Chase.

The final question with respect to the Baer's contract claim, therefore, is whether his contract is enforceable in light of the traditional requirement of definitiveness in New Jersey contract law for a contract to be enforceable. A contract may be expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others. There is a point, however, at which interpretation becomes alteration. In this case, even when all of the parties' verbal and non-verbal actions are aggregated and viewed most favorably to Baer, we cannot find a contract that is distinct and definitive enough to be enforceable.

Nothing in the record indicates that the parties agreed on how, how much, where, or for what period Chase would compensate Baer. The parties did not discuss who would determine the "true value" of Baer's services, when the "true value" would be calculated, or what variables would go into such a calculation. There was no discussion or agreement as to the meaning of "success" of The Sopranos. There was no discussion how "profits" were to be defined. There was no contemplation of dates of commencement or termination of the contract. And again, nothing in Baer's or Chase's conduct, or the surrounding circumstances of the relationship, shed light on, or answers, any of these questions. The district court was correct in its description of the contract between the parties: "The contract as articulated by the Plaintiff lacks essential terms, and is vague, indefinite and uncertain; no version of the alleged agreement contains sufficiently precise terms to constitute an enforceable contract." We therefore will affirm the district court's rejection of Baer's claim to recover under a theory of implied-in-fact contract.…

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NOTE 1:
HOW WOULD THE CASE COME OUT UNDER UCITA, ARTICLE 2 OR THE CISG?

UCITA § 202: FORMATION IN GENERAL (Article 2 has an identical rule).

(a) A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract.

(b) If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed on, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.

© Even if one or more terms are left open or to be agreed upon, a contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

(d) In the absence of conduct or performance by both parties to the contrary, a contract is not formed if there is a material disagreement about a material term, including a term concerning scope.

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Article 12 [Article 14 CISG]
[Offer]

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

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Note

The U.S. Supreme Court has defined an implied-in-fact contract as "an agreement ... founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Balt. & Ohio R.R. v. United*

States, 261 U.S. 592, 597, 58 Ct.Cl. 709, 43 S.Ct. 425, 67 L.Ed. 816 (1923).

NOTE 2:
Compare an implied in law or "quasi-contract":

COGHLAN v. WELLCRAFT MARINE, 240 F.3d 449

"The district court properly dismissed the Coghlans' unjust enrichment claim. In Texas, unjust enrichment is based on quasi-contract and is unavailable when a valid, express contract governing the subject matter of the dispute exists. Unjust enrichment is an equitable remedy in Florida as well, used to strip ill- begotten, non-contractual benefits from a defendant. An express contract governed the Coghlans' purchase of their boat, and no implied or quasi-contract will be found where an express contract exists. ….."

Lucent Technologies v. Mid-West Electronics
2001 WL 725372 (Mo. App. 2001)

"*Quantum meruit* is a remedy for the enforcement of a quasi- contractual obligation and is generally based on the principle of unjust enrichment." The essential elements of a quasi-contract or *quantum meruit* claim are (1) benefit conferred by one party on another, (2) appreciation or recognition by the receiving party of the fact that what was conferred was a benefit, and (3) acceptance and retention of the benefit in circumstances that would render that retention inequitable. When one party has been unjustly enriched at the expense of another, the beneficiary can be compelled to make restitution to the one conferring that benefit.