

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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ABB Enterprise Software, Inc., f/k/a Ventyx ) ASBCA No. 60314  
 )  
Under Contract No. N00174-05-C-0038 )

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OPINION BY ADMINISTRATIVE JUDGE KINNER ON APPELLANT'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT AND THE  
GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Appellant, ABB Enterprise Software, Inc., f/k/a Ventyx (ABB), has allowed the Department of the Navy to install its proprietary software on ships and Navy bases pursuant to a master license agreement. ABB claims the Navy breached that agreement by installing two copies of the software on aircraft carriers where the license agreement allows only one. In a 29 June 2016 decision,<sup>1</sup> the Board confirmed its jurisdiction to entertain ABB's complaint regarding its license agreement with the Navy because execution of the agreement was part of the performance of Contract No. N00174-05-C-0038 (contract 0038). Thereafter, we granted the Navy's motion to amend its answer to include an affirmative defense of equitable estoppel. Now, ABB moves for summary judgment on Count I of its complaint for entitlement based on its interpretation of the license agreement which it proffers only allows one copy of the software to be installed on one server per ship. In response, the Navy disputes ABB's interpretation of the agreement and cross moves for summary judgment on the issue of equitable estoppel to deny the appeal.

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<sup>1</sup> *ABB Enterprise Software, Inc., f/k/a Ventyx*, ASBCA No. 60314, 16-1 BCA ¶ 36,425.

## STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The corporate predecessor of ABB, Tech-Assist, began contracting with the Navy as early as 1995 to supply software and licenses to support naval maintenance requirements (gov't Statement of Undisputed Material Facts (gov't SUMF) ¶ 1; app. Statement of Undisputed Material Facts (app. SUMF) ¶ 7). The Navy procured licenses for the company's proprietary Electronic Shift Management System software, known as (eSOMS) (gov't SUMF ¶ 2; app. SUMF ¶ 7-8). An earlier version of the software was known as SOMS (*id.*). Specifically, the Tech-Assist software is a system to support "tag-out" of equipment during maintenance (gov't SUMF ¶ 2; app. SUMF ¶ 6).

2. The term "tag-out" refers to a maintenance technique used to protect workers performing service on machinery from injuries that can be caused by the unexpected startup of the machinery or the release of stored energy in the equipment (*see* R4, tab 1 at 14, tab 3 at 24).<sup>2</sup> *See also* Occupational Safety & Health Administration website, <https://www.osha.gov/dts/osta/lototraining/tutorial/tu-overvw.html>; NAVSEA Tag-out user manual, [http://www.public.navy.mil/NAVSAFECEN/Documents/afloat/Surface/Rsrcs/References/TUM\\_REV\\_07.pdf](http://www.public.navy.mil/NAVSAFECEN/Documents/afloat/Surface/Rsrcs/References/TUM_REV_07.pdf) at 6.

3. Two contracts are identified in the complaint (compl. ¶ 3). First, Contract No. N00174-04-M-0272 was awarded to Tech-Assist on 29 September 2004 to procure 76 single-site/server license clearance modules (one license at full price of \$19,995 and 75 at a 75 percent discount or \$5,995.00 each) and 76 single-site/server license equipment modules (one license at full price of \$14,995.00 and 75 at a 75 percent discount or \$4,495.00 each) (R4, tab 1 at 3-5). The contract included an "eSOMS Annual Maintenance/Support Contract" (*id.* at 15). The statement of work required Tech-Assist to complete the contracted tasks pursuant to guidance from the government technical task manager (*id.* at 14).

4. In November 2004, Tech-Assist and the Naval Sea Logistics Center (NSLC) entered a Software License Agreement (app. opp'n, ex. 1 at 4006). Mr. Matthew A. Lechowicz, president of Tech-Assist, executed the agreement (*id.* at 4008). The license grant states: "Licensor grants to the Licensee a limited, nontransferable, nonexclusive license to use the Software subject to the terms and conditions provided herein at the location(s), number of server(s), and number of mobile device(s) specified below" (*id.* at 4006). Beneath the license grant are headings for "Location," "No. of Server(s)," and "No. of Mobile Device(s)." The location is "To Be Determined," the number of servers is 76 and 0 mobile devices were licensed. The agreement included Clearance, Equipment and Utilities program modules, but there is no

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<sup>2</sup> All Rule 4 cites are to the consecutively-numbered pages.

restriction regarding the number of servers upon which the software could be installed at any location. (*Id.*)

5. ABB's claim arose under the second contract identified in the complaint, Contract No. N00174-05-C-0038 (contract 0038), which was executed on 21 September 2005 (compl. ¶ 3; R4, tab 3). Although ABB captioned its appeal as involving both contracts, it submitted a claim only upon contract 0038. As explained in our earlier opinion, we do not possess jurisdiction over claims not first submitted to the contracting officer, and therefore, construe this appeal to only apply to the claim submitted upon contract 0038. *ABB Enterprise Software, Inc., f/k/a Ventyx*, ASBCA 60314, 16-1 BCA ¶ 36,425 at 177,574 n.1. In contract 0038 the Navy procured 73 clearance modules at \$5,995 each and 73 equipment modules at \$4,495 each (gov't SUMF ¶ 6; app. Statement of Genuine Issues of Material Fact (SGIMF) ¶ 6; R4, tab 3 at 23). The statement of work required Tech-Assist to provide "additional-site/server licenses" (R4, tab 3 at 24). The licenses for the purchased modules were for a server at each location (*id.*). Contract line item number 0003 procured eSOMS Support Cost, which required one-year maintenance support (*id.*). Also, similar to the prior contract, the upgrade and maintenance work of the contract was to be performed by a team of contractor and government personnel at the direction of the Navy Technical Task Manager (R4, tab 1 at 14, 24).

6. Preceding the award of contract 0038, Tech-Assist had submitted to the Navy a price proposal dated 1 September 2005 (gov't SUMF ¶ 5). The Navy provides a portion of the proposal with its motion as an exhibit (gov't SUMF, ex. 5). The license quantities in the proposal were "taken from discussions with eSOMS project management personnel" (gov't SUMF ¶ 5). The proposal appears to identify previously licensed locations with an "ID" number for each (gov't SUMF, ex. 5). The list includes the 12 aircraft carriers that are the subject of the dispute. There is no acknowledgment in the proposal that the carriers included two installations of eSOMS on separate servers. The proposal indicates a proposed eSOMS license agreement was attached, but it is not part of the exhibit. (*Id.*)

7. In the fall of 2005, Tech-Assist and NSLC entered into a Master Software License Agreement (MSLA) (gov't SUMF ¶ 7; app. SUMF ¶ 12; R4, tab 4). The MSLA granted the Navy "a limited, nontransferable, nonexclusive license to use the Software subject to the terms and conditions provided herein at the location(s), number of production servers(s), and number of mobile device(s) specified in Exhibit A of this Agreement" (gov't SUMF ¶ 7; app. SUMF ¶¶ 12, 13; R4, tab 4 at 40).

8. Exhibit A to the MSLA is a "Licensing Matrix" chart (R4, tab 4 at 43). The first of the 13 columns on the chart contains sequential numbering of the entries. That column is untitled. The second column titled "No." lists a non-sequential license

number for each installation. (Gov't SUMF ¶ 8; app. SUMF ¶ 15; R4, tab 4 at 43-50) The next column lists the facility or ship where eSOMS is to be used (R4, tab 4 at 43-50). The fourth column is titled "No. of Servers" and has a numerical entry for each location. For every location, the matrix lists one license number for one server. (*Id.*; gov't SGIMF ¶ 15) The matrix identifies 168 specific locations and 100 locations identified as "To Be Determined" (*id.*). Each entry for a location to be determined also lists one server for the location (R4, tab 4 at 47-50). The chart also has columns entitled "Clearance," "Equipment," and "Utilities" which contain a check mark for each entry (*id.* at 43-50). The check mark signifies that feature is licensed for that entry (*id.* at 50).

9. Section D of the MSLA, titled "SOFTWARE PRODUCTS LICENSE AND USE," states in paragraph 1: "The Software and any part thereof may be used only at and for the locations and number of server(s) as identified in the Exhibits for its own internal business purposes only" (R4, tab 4 at 1-2; app. SUMF ¶ 14; gov't SGIMF ¶ 14). Paragraph 1 of Section H, "GENERAL PROVISIONS," provides that the MSLA "may be amended only by an instrument in writing executed by the Licensee and Licensor" (gov't SUMF ¶ 7; app. SUMF ¶ 18; R4, tab 4 at 42).

10. The MSLA applies only to eSOMS, not the prior version of the software (R4, tab 4 at 40). The license matrix indicates where the software may be used in the future, and on how many servers at each location (*id.* at 43-50).

11. Karen Hanson, the Navy logistics specialist who administered eSOMS licenses, and Todd Stoltzfus, the Navy engineer who signed the MSLA, testified by affidavit that, when the MSLA was signed, eSOMS software had already been installed on carriers under a different license agreement (gov't SUMF, ex. 2, ¶ 2, ex. 4, ¶¶ 3-4). Both individuals testify that Tech-Assist participated in installing the software on two servers on each carrier using a single license number (gov't SUMF, ex. 2, ¶¶ 3-4, 6). There is no evidence whether license agreements prior to 2004 permitted use of the software on two servers on carriers.

12. Ms. Hanson was the Navy's technical task manager for contract 0038 (R4, tab 3 at 26). Ms. Hanson testified that Tech-Assist provided her an updated license/site spreadsheet periodically and, in 2006 when she took over the licensing function, she provided Tech-Assist an updated spreadsheet whenever a change occurred to ensure the Navy was in sync with Tech-Assist (gov't cross-mot., ex. 2, ¶ 7). Ms. Hanson provided as an exhibit to her declaration an example of the spreadsheets she exchanged with Tech-Assist (*id.*, ex. 1). The sample spreadsheet includes columns for an ID number, site name, the installation date, a date for expiration of the license at that location, and the contract under which that copy of eSOMS was purchased (*id.*). Ms. Hanson highlighted the entries for the carriers to

show that only one license was provided for each carrier (*id.*, ex. 2, ¶ 7). Ms. Hanson testified that there were two installations of the software on each carrier (*id.*).

13. As in the 2004 Software License Agreement, Mr. Matthew Lechowicz, the president of Tech-Assist, executed the MSLA (R4, tab 4 at 50). Mr. Stoltzfus testified that there was no discussion of multiple installations of the eSOMS software on carriers prior to executing the 2005 MSLA (gov't SUMF, ex. 4, ¶ 6).

14. In 2004, NSLC started using a government generated "eSOMS Installation Form" to help track the installation of eSOMS on Navy ships and shore facilities (gov't SUMF, ex. 2, ¶ 4; app. supp. SGIMF at 11-12). NSLC provided these forms to contractor technicians when they installed or modified eSOMS (*id.*). The forms identified, among other things, date of installation or modification, name of ship or shore facility, name of server, installer information, and eSOMS license number (gov't SUMF, ex. 2, attach. 2). The software purchased under contract 0038 was initially installed by Tech-Assist personnel, however, the Navy also used another contractor, MI Technical Solutions (MITS), for eSOMS installation beginning in 2007 (app. SUMF ¶ 21; gov't SGIMF ¶ 21).

15. The Tech-Assist or MITS personnel performing an installation or upgrade completed the Navy installation forms and emailed or submitted them when completed to Ms. Hanson at NSLC (app. SUMF ¶ 22; gov't SUMF ¶ 13; gov't SGIMF ¶ 22). According to Ms. Hanson, while at the NSLC, she relied upon the "one license per carrier" practice to manage the MSLA license limit and to ensure the Navy did not exceed the license limit of 268 (gov't SUMF, ex. 2 at 7).

16. As support for its motion, the Navy compiled information from some of the installation forms for carriers in tables to show that eSOMS is installed on two servers on nine different carriers (gov't SUMF ¶ 14, exs. 7, 2, ¶ 6; app. supp. SGIMF at 12-14). According to the Navy, the forms show that the Tech-Assist personnel who filled out the forms did not change the license number or add another license number for a carrier after eSOMS was installed on a second server on the same carrier (gov't cross-mot. at 8-9).

17. The form for the USS *Roosevelt* shows the "Number of servers installed as '2'" but lists only one server name (gov't SUMF, ex. 7 at 11). The tables and installation forms show that, except for the USS *Eisenhower*, the two eSOMS installations on carriers occurred from 1 to 13 months apart (gov't SUMF ¶ 14, ex. 7; app. opp'n, ex. 13). The government also provided the affidavit of Mr. Jerry Zumbro, who worked for the United States Fleet Forces (USFF) as the Navy Assistant Program Manager for eSOMS between 2007-2009, and Program Manager 2010-2011 (gov't SUMF, ex. 3, ¶¶ 1, 2). Mr. Zumbro testified that he exchanged spreadsheets with Tech-Assist to help track eSOMS against the license limit (*id.*, ¶ 5). Mr. Zumbro

testified that Ms. Hanson monitored the spreadsheets and his “counterpart” at Tech-Assist was Mr. Lechowicz (*id.*, ¶ 3). Like, Ms. Hanson, Mr. Zumbro asserts that he counted carriers as one installation when tracking licenses against the MSLA limit (*id.*, ex. 2, ¶ 7, ex. 3, ¶ 5).

18. Mr. Zumbro testified that the spreadsheets showed one license number per carrier, notwithstanding installations on two carrier servers (gov’t SUMF, ex. 7, ¶ 19, ex. 3, attach. 1). The sample spreadsheet provided as Exhibit 1 to Mr. Zumbro’s affidavit, however, provides no evidence that the parties recognized, that more than one eSOMS installation occurred on carriers. The sample spreadsheet does not indicate a license number, or the number of servers, or number of installations per location. (Gov’t SUMF, ex. 3, attach. 1).

19. A similar version of the license spreadsheet was forwarded by Tech-Assist’s president Mr. Lechowicz, to Ms. Hanson and Mr. Stoltzfus (gov’t reply at 6 n.5). That spreadsheet showed a single license number for carriers: USS *Eisenhower*, USS *Enterprise*, USS *Kitty Hawk*, USS *Nimitz*, USS *Roosevelt*, USS *Stennis*, USS *Truman*, USS *Vinson*, USS *Washington*, and USS *Reagan* (gov’t reply, ex. 9). The spreadsheet does not indicate that eSOMS was installed twice on the carriers.

20. To establish that the spreadsheet was created by Mr. Lechowicz, the Navy provided a declaration from its litigation support contractor, Deloitte Federal Discovery (gov’t reply, ex. 3). The Deloitte project manager, Mr. Anmoli I. Bootwala, states that the metadata for the spreadsheet shows it was created by Mr. Lechowicz on 6 September 2001 (*id.*).

21. Despite two server installations, Tech-Assist used one license per carrier in pre-MSLA price quotes, license tracking spreadsheets, installation forms, and the MSLA (gov’t cross-mot. at 15, exs. 1, 2, ¶¶ 3, 5-7, ex. 3, ¶ 5, exs. 5, 7; gov’t SUMF ¶¶ 5, 9-10, 12-14, 16, 19).

22. Ventyx acquired Tech-Assist in February 2008 (gov’t SUMF ¶ 21; app. SGIMF ¶ 21). Tech-Assist assigned the Master Software License Agreement to Ventyx in December 2009 (R4, tab 6; gov’t SUMF ¶ 21; app. SUMF ¶¶ 2-3). ABB, Inc. acquired Ventyx in June 2010 (app. SUMF ¶ 2). Ventyx continued to operate as a wholly-owned subsidiary of ABB, Inc., but subsequently changed its name to ABB Enterprise Software, Inc. (gov’t SUMF ¶ 21; app. SUMF ¶¶ 2-3). Tech-Assist president, Mr. Lechowicz, left the company after its acquisition by Ventyx (app. SUMF ¶ 2; gov’t SGIMF ¶ 2).

23. In support of its motion, ABB submitted the declaration of Randall White, a Vice President for Business Solutions for ABB (app. SUMF, ex. 4, ¶ 1). Mr. White

was a Strategic Account Executive for Ventyx, from November, 1997 to June, 2011 and has been ABB's primary liaison to the Navy since the acquisition of Tech-Assist (*id.*). Mr. White was responsible for day-to-day customer relations and optimal use of Ventyx products (*id.*). With such responsibilities, it is likely Mr. White would be aware of the disposition of eSOMS licenses pursuant to Ventyx contracts with the Navy. Mr. White attended meetings and phone calls with representatives of the Navy regarding the Navy's compliance with the MSLA. (*Id.* ¶ 2)

24. Mr. White testified that he contacted Ms. Hanson by email because he began to have concerns in July 2011 regarding the Navy's control of eSOMS installations performed by MITS (app. SUMF, ex. 4, ¶ 3; gov't cross-mot., ex. 2, ¶ 9). His concerns were prompted by information he had received regarding the possibility that the software was being installed "for new construction" at "private Navy yards" without Ventyx involvement (app. SUMF, ex. 4, ¶ 3). His declaration gives no indication that Ventyx was concerned with the use of eSOMS on aircraft carriers at that time. In early August 2011, Mr. White informed Ms. Hanson that until Ventyx reconciled the existing installations no additional installations of eSOMS should be performed (app. SUMF, ex. 4, ¶ 7; gov't SGIMF ¶ 27).

25. He was unable to obtain installation information from Ms. Hanson because, at that time, she no longer participated in the Navy's eSOMS management (gov't SGIMF ¶ 29). Mr. White testified that he then developed a License List to track copies of eSOMS in use by the Navy (app. SUMF, ex. 4, ¶¶ 8-9). To develop his License List, he utilized information previously maintained by Tech-Assist and information from the official inventory of United States Naval Ships that is available on the internet (*id.* ¶ 5).

26. Mr. White continued to pursue a reconciliation of eSOMS licenses through the end of 2011 (app. SUMF, ex. 4, ¶¶ 4-7). A version of Mr. White's License List, dated 15 October 2011, was sent to the Navy (app. SUMF ¶ 31, ex. 4, ¶¶ 8, 12, ex. C; gov't SGIMF ¶ 31). Mr. White's License List showed that the Navy had installed 278 instances of eSOMS, which Ventyx considered to be ten above the allowed number of licenses (*id.*). The Navy disagreed with Ventyx's count and conducted its own investigation (*id.*). When finished, the discrepancy between the Ventyx list and the Navy's list resulted, in part, because Ventyx counted two installations per carrier and the Navy counted carriers once (*id.*).

27. In November 2011, Ventyx and the Navy discussed their conflicting positions but came to no resolution (app. SUMF ¶ 35; gov't SGIMF ¶ 35). On 1 December 2011, Ms. Nizme Cuin, Principal Assistant Program Manager in the Space and Naval Warfare Systems Command (SPAWAR), stated in an email response to Mr. Zumbro: "We could not find in your attachments any reference from Tech-Assist acknowledging that the two licenses for the two servers in the carriers

count as one license. The license agreement does clearly state one license per server.” (App. opp’n, ex. 10 at 9061)

28. In an email exchange between Mr. Stoltzfus and Mr. Lechowicz on 11 December 2011, Mr. Stoltzfus discussed the dispute with ABB regarding the number of licenses for a carrier (app. opp’n, ex. 11). He stated, “Even though we have not been able to find anything in writing, we continue to think the carriers were treated as a ‘site’ and needed only one license even though there are two servers. I know the maintenance agreement says that they have one server.... Did you ever agree to the carriers only having one license?” Mr. Lechowicz responded: “As for your question it’s a gray area. My guess is that a strict interpretation of the license agreement would require a license for each server; however practice had been to treat them as one site. It’s probably one for the lawyers to decide.”

29. Ventyx wrote a letter to the Navy on 23 December, 2011 demanding that the Navy stop using eSOMS on the ten ships on which eSOMS had most recently been installed (R4, tab 8). In a 19 January 2012 letter, by a Branch Head from SPAWAR responding to Ventyx’s 2011 letters, the Navy stated that the government was in compliance with the license agreement because the Navy had eSOMS in use at only 263 locations (R4, tab 9).

30. In February 2012, Ventyx and SPAWAR conducted a final audit meeting to resolve the differences between Ventyx and the Navy concerning the number of instances of eSOMS in use by the Navy (app. SUMF ¶ 44; gov’t SGIMF ¶ 44). The discrepancy between Ventyx’s License List and the U.S. Fleet Forces (USFF) License List continued to be due to the USFF counting one installation of eSOMS for each aircraft carrier, and Ventyx’s License List counting two installations on aircraft carriers (app. SUMF ¶ 46; app. mot., ex. 4, attachs. C, D).

31. Mr. White specifically testified that Ventyx was unaware of the number of installations in use by the Navy until he confirmed there were 278 with information SPAWAR provided as an update to his license list (app. SUMF, ex. 4, ¶ 13). The ten additional installations were not performed on aircraft carriers (*id.*). According to Mr. White, Ventyx was unaware that the Navy exceeded the number of what it considered permissible installations of eSOMS until it completed its license reconciliation (*id.*).

### DECISION

The questions posed by the parties’ cross-motions are whether the MSLA means what it says and whether they are bound by what it means. The language of the MSLA limiting installation of eSOMS to one server per location is clear and unambiguous to ABB (app. mot. at 4-7). ABB concludes, therefore, that the Board



must give the terms of the MSLA their ordinary meaning and may not consider parol evidence to alter that meaning (app. mot. at 7-8). As a “rule of substantive law,” the “parol evidence rule renders inadmissible evidence introduced to modify, supplement, or interpret the terms of a fully integrated, unambiguous agreement.” *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004). The Navy disagrees, asserting the MSLA is ambiguous because the terms limiting installation of eSOMS to only one server per location conflict with its Exhibit A that lists 12 ships with installations on 2 servers (gov’t cross-mot. at 10, ex. 6 at ex. A). The Navy insists the plain language of the MSLA cannot be read without aid from surrounding facts (gov’t cross-mot. at 7). The Navy has also asserted an affirmative defense of equitable estoppel. According to the Navy, regardless of the MSLA’s plain meaning, based upon 15 years past practice, it is permitted to install eSOMS twice on aircraft carriers under a single license (*id.* at 8-11).

#### A. Standard of Review for Summary Judgment

Contract interpretation is a question of law that may be resolved by summary judgment. *Varilease Tech. Grp., Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002); *ThinkQ, Inc.*, ASBCA No. 57732, 13 BCA ¶ 35,221. However, summary judgment is only appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

#### B. The Plain Language Controls the Agreement

The Navy claims that the language of the MSLA can only be understood in the context of the parties’ prior course of dealing allowing two installations under one eSOMS license (gov’t cross-mot. at 8). It supports its assertion that the Board may consider such extrinsic evidence with citation to an unpublished decision in which the Federal Circuit “has considered extrinsic evidence in order to discern the presence of an ambiguity in contract terms” (*id.*). But in the case it cites, *Thomas Creek Lumber & Log Co. v. Kempthorne*, 250 F. App’x 316 (Fed. Cir. 2007), the appeals court held that contract terms “phrased in clear and unambiguous language...must be given their plain and ordinary meaning, and we may not resort to extrinsic evidence to interpret them.” *Id.* (quoting *Coast Fed. Bank, FSB v. United States*, 323 F.3d at 1038). The dispute in that case pertained to interpretation of a disclaimer of warranty in a contract for timber. The court declined to examine the extrinsic evidence offered by the appellant because the disclaimer “*As Is*” was unambiguous. *Thomas Creek Lumber*, 250 F. App’x at 318. It held that the Interior Board of Contract Appeals reasoned properly that “*As Is*” means “*As Is*.” *Id.* The Board’s conclusion reflected the assessment of an identical disclaimer, by the Courts of Claims, which stated “[i]t is difficult to imagine how the disclaimer could have been any clearer.” *Id.*

That is the situation here. It is difficult to imagine how the provisions of the MSLA could be clearer. The agreement explicitly states that the license provided to the Navy is only for the number of servers and locations identified in the attached license matrix (SOF ¶¶ 9, 11). The Licensing Matrix is equally explicit, identifying a specific location and specific number of servers at each location (SOF ¶ 10). The Licensing Matrix permits use of the software on only one server at each location (*id.*). The terms of that restriction cannot be read to include an exception for aircraft carriers, which may have more than one server on board the vessel. Nor can the plain numerical representation in the license matrix of “1” installation for each location be read to mean “2” for carriers. Because the Navy has not shown that the parties made any agreement regarding the use of eSOMS on carriers, other than the MSLA, there is no need to further consider application of the Parol Evidence Rule. *C&S Carpentry Servs., Inc.*, ASBCA No. 43865, 94-2 BCA ¶ 26,704.

### C. Equitable Estoppel

The Navy, however, requests summary judgment on its affirmative defense of equitable estoppel. It claims ABB should be estopped from enforcing the MSLA as written. The Navy bears the burden of proof to establish this defense. *Bridgestone/Firestone Research, Inc. v. Automobile Club de l'Ouest de la France*, 245 F.3d 1359, 1361 (Fed. Cir. 2001). The equitable principles underlying estoppel were identified by federal courts long ago. “An estoppel does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up.” *Snare & Triest Co. v. United States*, 43 Ct. Cl. 364, 367 (1908) (quoting *Ketcham v. Duncan*, 96 U.S. 659, 666 (1877)). These principles were extended to government contracts. *Branch Banking & Tr. Co. v. United States*, 98 F. Supp. 757, 768 (Ct. Cl. 1951) (quoting *Mahoning Inv. Co. v. United States*, 3 F. Supp. 622, 630 (Ct. Cl. 1933) (“The doctrine of equitable estoppel, or more properly as we think *quasi* estoppel, is gradually being extended by the modern courts to prevent a wrong being done ‘wherever, in good conscience and honest dealings,’ a party ought not to be permitted to repudiate his previous statements and declarations.”); see also *Harvey Radio Labs., Inc. v. United States*, 115 F. Supp. 444, 449 (Ct. Cl. 1953); *Dee Hong Lue v. United States*, 280 F.2d 849, 854 (Ct. Cl. 1960); *Manloading & Mgmt. Assocs., Inc. v. United States*, 461 F.2d 1299, 1303 (Ct. Cl. 1972); *Emeco Indus., Inc. v. United States*, 485 F.2d 652, 657, judgment entered, 203 Ct. Cl. 759 (1973). The Court of Claims then refined the concept with the elements adopted by the Ninth Circuit. *H&M Moving, Inc. v. United States*, 499 F.2d 660, 667-68 (Ct. Cl. 1974). Citing one of its earlier opinions, *California State Board of Equalization v. Coast Radio Products*, 228 F.2d 520, 525 (9th Cir. 1955), the circuit court set out four elements as necessary to establish the defense of estoppel.

The Federal Circuit later confirmed those elements to be necessary for estoppel in government contract cases.

Four elements must be present to establish an estoppel: (1) the party to be estopped must know the facts, *i.e.*, the government must know of the overrun; (2) the government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor must have a right to believe the conduct in question was intended to induce continued performance; (3) the contractor must not be aware of the true facts, *i.e.*, that no implied funding of the overrun was intended; and (4) the contractor must rely on the government's conduct to its detriment.

*American Elec. Labs., Inc. v. United States*, 774 F.2d 1110, 1113 (Fed. Cir. 1985). The court adhered to that standard for 26 years. *See, e.g., USA Petroleum Corp. v. United States*, 821 F.2d 622, 625 (Fed. Cir. 1987) ("The Claims Court set out the traditional [four] elements of estoppel"); *JANA, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991) (estoppel requires four elements); *Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 311 (Fed. Cir. 1997) ("This court has set forth a four element test to establish an estoppel claim in this situation."); *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000) (Patent case relying upon the "traditional [four element] test for equitable estoppel"); *United Pac. Ins. Co. v. Roche*, 401 F.3d 1362, 1366 (Fed. Cir. 2005) (court looked to "traditional requirements of estoppel").

Notwithstanding this history, in *Mabus v. General Dynamics C4 Sys., Inc.*, 633 F.3d 1356, 1359 (Fed. Cir. 2011), the court used the standard employed in patent and trademark disputes to restate equitable estoppel elements to be: "(1) misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted." The Navy relies upon *Mabus* to support its affirmative defense (gov't cross-mot. at 16).

In that case, General Dynamics had assumed the remaining option years of an unprofitable contract Motorola, Inc. had with the Navy. Although the ordering clause of the contract required orders be mailed, Motorola had regularly accepted orders it received by email. After assuming the contract, General Dynamics performed orders it received by email, but only after engaging in negotiations with the Navy. When the Navy sent orders by email without negotiating to take advantage of lower prices from prior option years, General Dynamics refused the orders. The Navy, however, demanded performance and denied General Dynamics' subsequent claim. On appeal, this Board applied the traditional four element test to deny the Navy's equitable estoppel defense. *General Dynamics C4 Systems, Inc.*, ASBCA No. 54988, 09-2 BCA

¶ 34,150 at 168,818. The Navy argued General Dynamics was estopped to refuse orders by email, but the Board found that the Navy could not meet the first element for estoppel because General Dynamics did not “know the facts.” *Id.* at 168,819. The contractor had not examined the ordering clause until the orders were issued without prior negotiations. *Id.* The Board found that General Dynamics’ failure to object to issuance of orders by email did not manifest an intent to waive the contract’s delivery restrictions when it later protested every order issued after negotiations were unsuccessful. *Id.*

The appellate court, however, rejected the Board’s analysis. The court explained that estoppel was established because it was undisputed that General Dynamics was aware that it previously accepted emailed delivery orders. *Mabus*, 633 F.3d at 1361 (“The knowledge at issue is not General Dynamics’ actual knowledge of the contract terms, but rather its knowledge that it was accepting emailed delivery orders.”). General Dynamics was estopped because it had accepted the initial email orders without objection, whether or not it was aware of the significance of those actions. The court rejected General Dynamics’ argument that the Navy could not reasonably infer from its silence it would not assert its contract rights. *Id.* at 1360. The court found the contractor’s failure to protest email orders to be misleading conduct.

Here, the Navy argues that Tech-Assist’s actions were similarly misleading. “If Tech-Assist had contemporaneously informed DON [Department of Navy] that carriers counted twice then DON could have managed the program to avoid exceeding the license limit” (gov’t cross-mot. at 17). Instead, the evidence shows that by 24 October 2007, Tech-Assist had installed the software on 2 servers on 12 ships (gov’t cross-mot. at 8-12). In its correspondence, Tech-Assist consistently referred to only one license for every ship, even where two installations had been performed (SOF ¶ 22). And, Mr. Lechowicz considered that to be a standard practice (SOF ¶ 24). The Navy, therefore, asserts that it could reasonably infer that Ventyx would not later assert a breach of the MSLA, because Tech-Assist failed to protest multiple installations on carriers in the years preceding its acquisition by Ventyx.

The Navy’s focus on the behavior of Tech-Assist is misplaced. Notwithstanding the court’s application of estoppel elements from patent cases, the determining fact which established estoppel in *Mabus*, was that General Dynamics had performed 13 emailed orders. *Mabus*, 633 F.3d at 1361. Undisputed facts demonstrated that the contractor was aware of its prior inconsistent position, thus, addressing the first traditional element. Moreover, the result in *Mabus* turned on the actions of General Dynamics, not Motorola. *Id.* Contrary to the situation in *Mabus*, the Navy has not proven that Ventyx was silent while it knew eSOMS was installed twice on carriers, which could mislead the Navy to believe Ventyx, or later ABB, would not assert its contract rights in the future. The Navy fails to support its assertion that ABB/Ventyx is

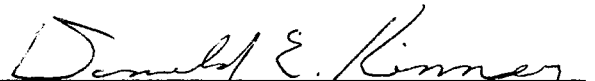
in a position to explain the conflict between the MSLA and the existing multiple installations on carriers (gov't reply at 7).

While establishing Tech-Assist's practice before and after the MSLA, the Navy has not produced evidence regarding Ventyx's actions or the information it received prior to 2011 (gov't reply at 10, 21). The only evidence of corporate interpretation of the MSLA by Ventyx is its letter asserting that multiple installations on carriers is a violation of the terms of the agreement. Although Mr. White relied upon information from Tech-Assist when formulating his license reconciliation, such information necessarily would have reflected Mr. Lechowicz's assignment of one license to each carrier. Without more, that information is consistent with the MSLA, and may not have alerted Ventyx that carriers had been treated differently than other ships. Mr. White's affidavit provides testimony to the contrary, that Ventyx was unaware that the Navy had exceeded the number of licensed installations of eSOMS. (SOF ¶ 31)

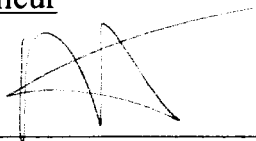
### CONCLUSION

Appellant's motion for summary judgment on Count I is granted. The Navy's cross-motion for summary judgment is denied.

Dated: 9 January 2018

  
DONALD E. KINNER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

  
RICHARD SHACKLEFORD  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur

  
OWEN C. WILSON  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 60314, Appeal of ABB Enterprise Software, Inc., f/k/a Ventyx, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals