UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 4, 2008

CBCA 918

ARCADIS U.S., INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Lacey Horton and Steve Fox of Arcadis U.S., Inc., Highlands Ranch, CO, counsel for Appellant.

James L. Weiner and Charles B. Wallace, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **PARKER** and **FENNESSY.**

FENNESSY, Board Judge.

Appellant, Arcadis U.S., Inc., (Arcadis or appellant) has appealed a decision of a contracting officer of the Fish and Wildlife Service, Department of the Interior (DOI), denying appellant's claim in the amount of $99,164 for the cost of fill required to complete a land remediation task order. Appellant elected the Board's accelerated procedure and the parties elected to submit the case for decision on the written record without a hearing. For the reasons discussed below, we deny the appeal.

Background

On June 1, 2000, the General Services Administration (GSA) awarded a multiple award federal supply schedule commercial items contract to Arcadis for environmental advisory services. The contract had a five-year base period and one five-year option. It included the provision "Contract Terms and Provisions--Commercial Items, (52.212-4) (March 2001), (Tailored)." Appeal File, Exhibit 21.[1]

On October 3, 2001, by modification P0004 to the contract, the parties added a line item for remediation services. Appeal File, Exhibit 22. On August 26, 2003, DOI issued a fixed-price task order to Arcadis pursuant to the multiple award schedule contract for labor and material to perform required remediation as set forth in specifications and drawings and Arcadis' amended proposal. The order incorporated the terms of the contract. It had a fixed price of $3,153,112, based upon the expectation that Arcadis would use on-site fill material.[2] Appeal File, Exhibit 5.

During the course of performance, it became necessary to use fill from off-site. The contracting officer recognized that the need for fill from off-site constituted a change to the contract and authorized Arcadis to provide the fill by a series of modifications to the task order. For example, bilateral modification 0002, executed on June 30, 2004, provided in pertinent part:

> The above referenced task order is modified as follows in order to confirm authorization to proceed (as set forth herein) on April 21 and May 21 2004.
>
> 1. The contractor shall provide additional fill material as required, and seeding and planting of buffer vegetation around parking lot and 2nd beach road areas (as previously defined) & other miscellaneous tasks associated with this project on a not-

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[1] At the Board's request, the Government supplemented the appeal file with the contract, modification P0004 to the contract, and modification PS05 to the contract as exhibits 21, 22, and 23, respectively.

[2] Arcadis had submitted an alternate proposal in the amount of $3,740,076 for the work based upon the assumption that it would procure and furnish the required fill from an off-site source.

> to-exceed basis with ceiling of $300,000 (4/21/04 verbal to proceed).
>
> 2. The contractor shall provide approximately 30,000 cubic yards of additional fill material on a not-to-exceed basis with ceiling of $260,000, for the site as agreed to in the field (5/21/04 verbal to proceed).
>
> 3. The task order completion date is extended and changed to read August 30, 2004. All other terms and conditions remain unchanged.
>
> The total order now reads $3,778,112 in lieu of $3,218,112 for an overall increase of $560,000.

Appeal File, Exhibit 7.

Bilateral modification 0003, effective July 15, 2004, confirmed a verbal authorization of July 15, 2004, requiring Arcadis to provide additional fill and increasing the price by $700,000, from $3,778,112 to $4,478,112. Appeal File, Exhibit 6.

Unilateral modification 4, effective November 2, 2004, added another $200,000 in funding to the contract. It stated:

> This modification is issued unilaterally. The above referenced task order is modified in order to provide additional funding for the required additional protective cover material and clear/grub (soil storage area) required for project completion. This change order confirms verbal authorization provided by the undersigned contracting officer. Arcadis shall continue performance under the above referenced order as changed herein. This modification results in an *increase of $200,000 (not-to-exceed)*. Another modification will be issued to definitize this change order and any additional funding required will be negotiated at that time. *The contractor shall not exceed the total funding as stated herein. The total order now reads $4,678,112 in lieu of $4,478,112.00 for an overall increase of $200,000.00 (not-to-exceed).* The task order completion date is extended and changed to read 12/31/2004. All other terms and conditions remain the same.

Appeal File, Exhibit 5 (emphasis added).

Bilateral modification 0006, effective April 5, 2005, added additional services and added funding in the not-to-exceed amount of $320,000, increasing the total price of the task order to "$4,998,112.00 (NTE [not to exceed])." This modification also stated that it confirmed prior verbal authorization to proceed.[3] Appeal File, Exhibit 4.

Effective July 15, 2005, the contracting officer unilaterally issued a no-cost modification extending the performance period to August 31, 2005. The modification stated, "The total order remains $4,998,112 (NTE)." Appeal File, Exhibit 3.

Arcadis subcontracted part of the work required by the task order, including the changed requirement to provide the required fill, to Envirocon, Inc., (Envircon). The record does not contain the subcontract, the modifications, or the billing records for Envirocon. Appeal File, Exhibit 15 at 2.

In early February 2005, Envirocon and Arcadis employees exchanged electronic mail messages concerning costs incurred for topsoil in excess of the amount provided for in the "schedule of values." They determined that Arcadis would submit a "change order" for costs in excess of the contract value. Appeal File, Exhibit 20 at 4.

The record includes an invoice from Envirocon to Arcadis dated March 8, 2005, in the amount of $101,866.03. A notation on the invoice states that it was originally for the sum of $110,587.02, but that it had been revised to the lower amount on August 17, 2005. Appeal File, Exhibit 20 at 2.

Arcadis did not invoice the Government for the soil reflected by Envirocon's invoice. Instead, Arcadis twice declined to pay the invoice, first, for lack of supporting documentation, and then, because Arcadis was not certain that the soil reflected on the invoice was required for the project. Arcadis disputed liability for Envirocon's invoice and was a party to litigation against Envirocon in Rhode Island. During the Rhode Island litigation, Arcadis and Envirocon engaged in mediation. The invoice in dispute was only one of the issues involved in the litigation with Envirocon. The parties settled that case in October 2006, with Arcadis accepting the Envirocon invoice in the amount of $101,866.03. Appeal File, Exhibit 15 at 2; Appellant's Reply Brief at 3 n. 4.

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[3] The record is confusing in that the second page of modification 6 stated that the additional funding was required for additional fill material but page three identified certain tasks which may, or may not, have been related to fill mentioned on page two.

By an e-mail message dated February 5, 2007, Arcadis requested the Government to add $100,000 to the contract because it had to "pay an additional $101,866.03 for soil." Appeal File, Exhibit 20. The Government wrote an undated letter to Arcadis stating that the invoice amount should be for only $67,187, due to various perceived overpayments and the fact that one load of soil for which Arcadis claimed payment was listed on an attachment to the invoice as having been delivered in December 2005, after the contract completion date. Appeal File, Exhibit 19.

In subsequent e-mail communications Arcadis satisfied the Government that there had been no overpayments. By letter dated February 23, 2007, Arcadis agreed to reduce the $101,866.03 amount by $2701.80 to $99,164.23 because the attachment to the invoice reflected that one load of soil included in the invoice had been delivered after the contract completion date.[4] Appeal File, Exhibit 17. Arcadis submitted a "supplemental invoice" invoice for $99,164.23 for additional soils. Notice of Appeal, Exhibit 5.

Meanwhile, e-mail communications between the parties established that Arcadis had never before submitted an invoice for payment of the Envirocon costs because to do so "would have made the total amount invoiced greater than the contract value, which creates problems for our auditors." Appeal File, Exhibit 17.

Following further communications between the parties, Arcadis, on April 10, 2007, submitted a request for an equitable adjustment of $99,164. Appeal File, Exhibit 13.

By letter dated July 18, 2007, the contracting officer denied Arcadis' request for an equitable adjustment upon the ground that the contracting officer had not issued an order for the additional fill at issue. Appeal File, Exhibit 1.

By letter dated August 7, 2007, Arcadis notified the contracting officer that it was exercising its right to appeal the denial of its request for an equitable adjustment. Appeal File, Exhibit 13. Appellant requested a point of contact at the board of contract appeals. By an e-mail message on August 8, the Government notified Arcadis that the "appeal" had been forwarded to the legal department for review and once the review was completed, the Government would provide a point of contact for the board. Appeal File, Exhibit 12.

By a letter dated August 27, 2007, the contracting officer notified Arcadis of its right to appeal the July 18 decision denying the request for an equitable adjustment to this Board

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[4] The Government now concedes that the December 2005 delivery was most like made in December 2004 since Arcadis had referenced it in correspondence in February 2005.

or, alternatively, to commence an action at the Court of Federal Claims. Arcadis commenced a timely appeal on September 21, 2007. Appeal File, Exhibit 11.

Discussion

Appellant contends that the language of task order modification 4 expressly authorized it to incur costs in excess of the not-to-exceed contract price. According to appellant, because modification 4 stated that another modification would be issued to add any additional funding required in excess of the not-to-exceed price, it is entitled to be paid $99,164.23 of the $101,866.03 for which its subcontractor invoiced.

The Government argues that modification 4 expressly limited the Government's liability to the fixed contract price as modified by the not-to-exceed price increases and that it directed Arcadis not to exceed the total funding as stated in the modification. The Government states that Arcadis assumed the risk of having incurred costs in excess of the contract price.

The issues raised by the parties involve a question of contract interpretation. When interpreting the language of a contract, we must give reasonable meaning to all parts of the agreement and not render any portion meaningless, or interpret any provision so as to create a conflict with other provisions of the contract. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc*., 713 F.2d 1541, 1555 (Fed. Cir. 1983). Accordingly, without rewriting or varying terms, *George Hyman Construction Co. v. United States*, 832 F.2d 574, 581 (Fed. Cir. 1987), contract language should be given the plain meaning that would be derived by a reasonably intelligent person acquainted with the contemporaneous circumstances. *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965); *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971).

Applying these principles, we find that the language of modification 4 was not ambiguous. The modification stated in two places that Arcadis was not to exceed the added funds. Further, it expressly mandated that Arcadis was not to exceed the contract total funding as stated in the modification. The modification authorized Arcadis "to continue performance . . . as changed herein." It did not authorize performance in excess of the funds obligated by the modification. It did not convert the incrementally funded task order into a cost type order.

Arcadis argues that the language, "Another modification will be issued to definitize this change order and any additional funding will be negotiated at that time," constituted a blank check to incur costs for whatever quantity of soil was necessary, with only the price to be determined at a later date. This argument is not persuasive. Rather than providing

authority to incur costs in excess of the not-to-exceed contract amount, that language made plain that negotiations and a subsequent modification would be necessary if Arcadis were to require any additional funds.

Arcadis' interpretation renders modification 4 patently ambiguous. A patent ambiguity exists when a contract contains an obvious omission, inconsistency, or discrepancy of significance. In those circumstances, a contractor is bound to inquire of the Government's intentions if it intends "to bridge the crevasse in his own favor." *Beacon Construction Co. v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963). A contractor's failure to comprehend an obvious ambiguity in no way excuses its affirmative duty of inquiry. *Carothers Construction Co. v. United States*, 20 Cl. Ct. 556, 560 (1990) (citing *J.A. Jones Construction Co. v. United States*, 395 F.2d 783 (Ct. Cl. 1968)). Here, appellant's construction creates an obvious inconsistency by rendering meaningless the express not-to-exceed price and the mandate not to exceed the total funding of the contract. Consequently, Arcadis was bound to inquire of the contracting officer before exceeding the contract funds.

Moreover, the Government's position is supported by the conduct of the parties both before and after the issuance of modification 4 to the order. Each of the modifications that added funds to the task order stated that the modification confirmed the contracting officer's verbal authorization to proceed with the work. This pattern makes clear that Arcadis understood that it was to obtain the contracting officer's authorization to incur costs in excess of the contract price.

Having found that the contract unambiguously precluded Arcadis from reimbursement in excess of the not-to-exceed price, we turn to Arcadis's alternative argument that, by having accepted the soil without paying for it, the Government has been unjustly enriched. The doctrine of unjust enrichment, for which quantum meruit is the remedy, is an equitable one, applied to those situations where the rights and remedies of the parties are not defined in a valid contract. The essence of an unjust enrichment claim is that, although no valid contract, either express or implied in fact, exists between the parties, justice requires that we create an obligation of a contractual nature for the sake of providing a remedy. *See Broce Construction Co. v. Department of Transportation*, DOT BCA 4464, 07-1 BCA ¶ 33,457 (2006); *National Trailer Convoy, Inc. v. United States*, 345 F.2d 573 (Ct. Cl. 1965); *Electric Power Plants Corp. v. United States*, 173 F. Supp. 615 (Ct. Cl. 1959); *Frazier-Davis Construction Co. v. United States*, 100 Ct. Cl. 120, 162 (1943). Here, there was a valid contract that required Arcadis to perform remediation of the site for a fixed price, as modified. Therefore, the theory of unjust enrichment does not apply to this case.

Arcadis also argues that the Government should be estopped from denying payment. 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 Electronic Laboratories, Inc. v. United States*, 774 F.2d 1110, 1113-14 (Fed. Cir. 1985) *(citing Hughes Aircraft Corp.*, ASBCA 24601, 83-1 BCA ¶ 16,396, at 81,516); *see United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970); *Emeco Industries, Inc. v. United States,* 485 F.2d 652, 657 (Ct. Cl. 1973).

The only element addressed by Arcadis is the fourth element. Arcadis claims it relied upon the language of task order modification 4 concerning future negotiations and modifications when it incurred funds in excess of the not-to-exceed contract amount. The record, however, does not disclose such reliance. The record demonstrates that Arcadis learned of the overrun in February 2005, after it had already been incurred. Arcadis did not acknowledge liability to Envirocon for the sum now claimed until the two firms settled a multi-issue dispute a year and a half after Envirocon submitted the invoice. This evidence does not warrant the conclusion that Arcadis relied upon its interpretation of task order modification 4 at the time the claimed costs were incurred.

Arcadis' position also does not satisfy the first element of estoppel -- Government knowledge of the overrun. Here, the record submitted by the parties reveals that the Government was unaware that Arcadis had overrun the contract funds until February 2007, although Envircon invoiced Arcadis for the costs in March of 2005 and the contract was completed in August 2005. There is no evidence that the Government knew or had reason to know that Arcadis had exceeded the contract funding limitation at any prior time.

This leads to a final consideration. Proceedings before the Board are *de novo. Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, et al., 07-2 BCA ¶ 33,678. To prevail on an equitable adjustment claim, the contractor must establish liability, causation, and resultant injury. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965). The contractor must prove its claim by a preponderance of the evidence. *Servidone*, 931 F.2d at 861. In the scheduling order the Board issued after the parties elected to proceed on the record rather than with a hearing, the Board expressly reminded the parties that:

> they will be held to the same burden of proof they would bear if a hearing were held and that affidavits or declarations generally will be given more weight than unsworn statements in the record.

Notwithstanding that reminder, there is essentially no probative evidence in the record to support Arcadis' claim. Arcadis' acceptance of Envirocon's invoice in settlement of a larger dispute with Envirocon is insufficient to warrant a finding of government liability.

Decision

The appeal is **DENIED**.

EILEEN P. FENNESSY
Board Judge

I Concur:

ROBERT W. PARKER
Board Judge