



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS IN PART DENIED: May 30, 2008

CBCA 708

CH2M HILL HANFORD GROUP, INC.,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Kenneth B. Weckstein and Shlomo D. Katz of Brown Rudnick Berlack Israels LLP, Washington, DC, and Stanley J. Bensussen of CH2M Hill Hanford Group, Inc., Richland, WA, counsel for Appellant.

Richard V. Gonzales, Holly Kay Botes, and John R. Dudley, Office of River Protection, Department of Energy, Richland, WA, counsel for Respondent.

Before Board Judges **POLLACK**, **DeGRAFF**, and **McCANN**.

McCANN, Board Judge.

Respondent has moved to dismiss count III of the complaint, pursuant to Board Rule 8(d), for failure to state a claim upon which relief can be granted. We deny the motion.

Background

1. CH2M Hill Hanford Group, Inc. (CH2M Hill) is a prime contractor to the Department of Energy (DOE), acting through the Office of River Protection (ORP), under contract number DE-AC27-99RL14047 (contract). CH2M Hill conducts the majority of its contractual activities on federally-owned land in southeastern Washington state on what is

commonly referred to as the Hanford Site. Complaint ¶ 8. Lockheed Martin Hanford Corporation (LMHC) and DOE entered into contract number DE-AC06-99RL14047 on September 30, 1999. Complaint ¶ 12. CH2M Hill purchased LMHC in December 1999. Complaint ¶ 13.

2. The original mission of the Hanford Site related to the production of weapons grade nuclear material. The production of weapons materials generated both solid and liquid radioactive waste which was stored in large underground tanks. The waste within the tanks must be retrieved, treated, and disposed of in a permanent waste repository. Complaint ¶ 9.

3. The materials in the tanks have the potential to generate vapors that contain ammonia and various volatile organic compounds. The venting of the vapors could be harmful to human health. Concern about the vapors led to the full-time use of supplied air in 1992. The term “supplied air” refers to air which is breathed through equipment such as a self-contained breathing apparatus (SCBA) or a portable supplied air system. Complaint ¶ 18. After extensive study, it was determined that supplied air was not required to protect workers. The decision that full-time use of supplied air was not required for safety was made in 1996 and was borne out in the three years that followed and immediately preceded the formation of the contract. Complaint ¶ 10.

4. On or about July 10, 1996, Westinghouse, a prior contractor, issued a report commonly referred to as the “Hewitt Report.” Complaint ¶ 20. The executive summary of the Hewitt Report summarizes its findings in relevant part, as follows:

After four years, sufficient information has been collected to evaluate the effectiveness of the strategy and resulting control measures. The conclusion is that the issues associated with protecting employees from overexposure to vapors during tank farm work are defined and controlled.

Employee exposure incidents have virtually ceased due to the implementation of controls around potential vapor release points and as a result of better communication regarding vapor odors and risks. Additional studies are not needed to verify these conclusions

It is concluded that tank farm worker health and safety considerations caused by the inhalation of potentially hazardous vapors have been resolved.

Id. ¶ 25.

5. Throughout Westinghouse's resolution of the hazardous vapor issues, the strategies, methods, results, conclusions, and recommendations were reviewed and approved by a number of independent bodies. These included: the Occupational Safety and Health Waste Tank Advisory panel, which consisted of nationally-recognized experts in the field of industrial health and safety; the Tank Farm Operations Advisory Council, which included Westinghouse and labor union representatives; and the Tank Farm Tank Vapor Task Team, which included representatives of several DOE contractors and DOE itself. Complaint ¶ 26.

6. At all relevant times, DOE was aware of and approved (or did not disapprove) Westinghouse's strategies, methods, results, conclusions, and recommendations described in the preceding paragraphs. DOE also approved the Tank Farm Health Safety Plan (HASP) for work at the Tank Farm. The HASP did not require or contemplate extensive use of supplied air at the site of the contract work. Complaint ¶ 27.

7. The Hewitt Report stated that "the intended users of this report include Tank Farm Workers, WHC [Westinghouse] Management, the Department of Energy, and the Public." DOE placed the report in ORP's Reading Room as a reference for, among others, future contractors. CH2M Hill relied on the Hewitt Report in entering into the contract. Complaint ¶ 28.

8. Following the issuance of the Hewitt Report in 1996 and continuing for the next seven years, supplied air was used by tank farm workers only in limited situations and was not required during the majority of routine tank farm tasks. During that time -- on September 30, 1999 -- LMHC and DOE entered into the contract. Complaint ¶ 29.

9. At the time of contracting, both parties believed that the contract could be performed without CH2M Hill having to make extensive use of supplied air for persons working on the contract. *Id.* ¶ 2. The contract did not put the risk of performance while using supplied air on the contractor. *Id.* ¶ 88. The parties agreed to a fee schedule and a cost schedule that the parties would have viewed as impossible to accomplish had they known that the work would have to be performed under the inefficient conditions associated with the use of supplied air. *Id.* ¶ 29.

10. The contract is a cost-reimbursement incentive contract and includes a fee pool. Complaint ¶ 30. The contract allocates 100% of the available fee to performance measures, originally called Performance Based Incentives (PBIs). Unlike traditional cost-type contracts which include a "base fee," CH2M Hill was able to earn a fee under the contract only by performing specified fee-bearing work. *Id.* ¶ 31.

11. In early 2003, tank farm workers began reporting incidents of exposure to vapors. Complaint ¶ 40.

12. In March 2004, DOE directed CH2M Hill to perform a comprehensive re-evaluation of the vapors health and safety program and to determine what changes, if any, were required to protect workers. DOE directed CH2M Hill to complete the re-evaluation before performing work without respiratory protection. Complaint ¶¶ 58-60.

13. The directions to perform the re-evaluation and for the workers to wear respiratory protection was not a part of the contract statement of work or the contract performance baseline. Complaint ¶ 61. The practical effect of DOE's direction was to require CH2M Hill to provide all tank farm workers with supplied air indefinitely. Complaint ¶ 64.

14. Working with respiratory protection, especially supplied air, is much less efficient than working without such equipment. Complaint ¶ 65. Using supplied air reduces productivity substantially. Complaint ¶ 67.

15. CH2M Hill gave DOE written notice, citing the contract's Changes clause, of CH2M Hill's "request for an equitable adjustment due to impacts resulting from changes in requirements for the protection of workers from chemical vapors." That notice explained:

These changed conditions and changed requirements have significantly impacted CH2M HILL's ability to complete the work contained within the PBIs (including specifically tank retrieval and waste feed delivery projects) and thereby have and will significantly impact CH2M HILL's ability to meet Hanford Federal Facility Agreement and Consent Order (HFFACO) milestones and our ability to earn fee. Finally, these new and different requirements when applied to preexisting conditions have added significant new scope to our contract for which [DOE] has not provided additional new funding, thereby substantially impacting any meaningful opportunity for us to earn acceleration fee.

Complaint ¶ 68.

16. DOE did not grant CH2M Hill an equitable adjustment to compensate it for the loss of fee as a result of DOE's actions and inactions. DOE did not equitably adjust the contract to provide additional funding and time for CH2M Hill to meet the fee bearing milestones. Complaint ¶ 71.

17. CH2M Hill filed a certified claim under the Contract Disputes Act for recovery of the lost fee opportunity arising from the ordered and constructive changes and, in the alternative, for reformation of the contract. Complaint ¶ 72. DOE issued a final decision denying CH2M Hill's claim in its entirety. *Id.* ¶ 73.

18. In count I of the complaint CH2M Hill contends that DOE's direction to do a comprehensive re-evaluation of the Industrial Hygiene/Health and Safety Program and its direction for the workers to use supplied air were added requirements and therefore changes to the contract which deprived CH2M Hill of the opportunity to earn a fee totaling \$7,080,000. Complaint ¶¶ 74-78.

19. In count II of the complaint CH3M Hill contends that, by failing to consider and implement CH2M Hill's baseline change requests to mitigate the cost and schedule effects of the added requirements, DOE breached its implied duty to cooperate with the contractor, thereby depriving CH2M Hill of the opportunity to earn a fee totaling \$7,080,000. Complaint ¶¶ 79-82.

20. In count III of the complaint CH2M Hill contends, in the alternative, that it is entitled to reformation of the contract because of mutual mistake of fact made by the parties in entering into the contract. CH2M Hill contends that CH2M Hill and DOE were mutually mistaken in their belief that the contract could and would be performed without the use of supplied air. CH2M Hill contends that the parties agreed to a cost and fee schedule that they would have viewed as impossible to accomplish had they known that the work would have to be performed under the inefficient conditions associated with the use of supplied air. CH2M Hill contends that DOE expected contractors to base their bids for the contract on the information provided in DOE's technical library, e.g., the Hewitt Report. Complaint ¶¶ 83-88.

Discussion

In its pending motion, respondent contends count III of the complaint should be dismissed for failure to state a claim upon which relief can be granted. The motion is akin to a 12(b)(6) motion under the Federal Rules of Civil Procedure. Under such circumstances, the Board must accept the facts set forth in the pleadings as true and construe them in the light most favorable to appellant. *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002) (In ruling on a 12(b)(6) motion, "we assume all well-plead factual allegations in the complaint to be true and draw all reasonable inferences in the plaintiff's favor."). We have consequently stated in the Background section of this decision facts as presented in the complaint. The Board may find these assertions to be either true or false as we consider the merits of the case.

In count III, CH2M Hill contends it is entitled to reformation of the contract because of a mutual mistake of fact made by the parties when they entered into the contract. The following are the elements of mutual mistake of fact that would, if proven, allow for relief:

(1) the parties to the contract were mistaken in their belief regarding an existing fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of mistake on the party seeking reformation.

Bath Iron Works Corp., ASBCA 44617, et al., 97-2 BCA ¶ 29,073, at 144,695 (citing *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994); *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990)).

According to respondent, appellant has not alleged the existence of a mutual mistake. Instead, says respondent, appellant alleges that when the parties entered into the contract, they failed to predict that appellant would have to perform using supplied air. Respondent suggests that appellant must bear the risk of any failure to make an accurate prediction of future events.

We see no flaw in the manner in which appellant has pled mutual mistake of fact. Appellant alleges that at the time of contract award both parties believed that any vapor problem had been resolved and that the work would be performed without the use of supplied air. Appellant says the parties agreed to a cost and fee schedule that they would have viewed as impossible to accomplish had they known that the work would have to be performed under the inefficient conditions associated with the use of supplied air. According to appellant, the use of supplied air caused worker inefficiency and significantly increased its cost of performance. Appellant alleges it did not accept the risk of performing using supplied air. Because these allegations support the claim of mutual mistake set out in count III of the complaint, we reject respondent's argument.

Decision

Respondent's motion to dismiss count III of the complaint is **DENIED**.

R. ANTHONY McCANN
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

MARTHA H. DeGRAFF
Board Judge