UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 4, 2009

CBCA 1308

GARDNER ZEMKE COMPANY,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Linda Zemke, Albuquerque, NM, counsel for Appellant.

Elaine England, Office of the Regional Solicitor, Department of the Interior, Salt Lake City, UT, counsel for Respondent.

DRUMMOND, Board Judge.

Appellant, Gardner Zemke Company (GZC), appealed the deemed denial of its claim in the amount of $16,019.44 on a construction contract to modify an irrigation system in New Mexico. GZC has elected to have its claim decided under the Board's small claims procedures. Under such procedures, a decision is rendered by a single judge, is not appealable, and may not be cited as precedent.

This appeal was submitted on the written record pursuant to Rule 19 of the Board's Rules of Procedure. The record consists of the pleadings; appeal file (Appeal File, Exhibits 1 through 22); joint statement of uncontested facts (JSUF 1 through 13); Government's statement of additional facts (GSAF 1 through 6); GZC's motion for summary relief

(Appellant's Motion), accompanied by affidavits of Sharon Hererra, Stephen Hickman, and James Eichel; GZC's addendum to its motion; Government's response opposing the motion filed by GZC; (Respondent's Opposition); Government's motion for summary relief (Respondent's Motion); and GZC's response opposing Government's motion (Appellant's Opposition).

Each party has moved for summary relief based upon the existing record. The Government has also asserted an affirmative defense in its answer. Because the affirmative defense asserts that the Board lacks jurisdiction over this appeal, we will treat it as a motion to dismiss and address it accordingly. For the reasons below, we conclude that the appeal is within our jurisdiction and deny respondent's motion to dismiss for lack of jurisdiction. We further grant respondent's motion for summary relief and consequently deny appellant's appeal.

Background[1]

On September 23, 2005, the Department of the Interior, Bureau of Reclamation (BOR) awarded to GZC contract 05-CC-40-8116 (the contract). JSUF ¶ 1; Appeal File, Exhibit 2 at 1, 2. The contract was awarded in the fixed-price amount of $1,847,657.97, and called for the modification of an existing irrigation system (Project) in New Mexico. JSUF ¶¶ 2, 3; Appeal File, Exhibit 2 at 1, 2. Under the contract as awarded, all work was to be completed by March 1, 2008. JSUF ¶ 5; Appeal File, Exhibit 2 at 3.

Under terms of the contract GZC was required to pay all taxes. The contract incorporated by reference Federal Acquisition Regulation (FAR) clause 52.229-3, Federal, State and Local Taxes (April 2003). Appeal File, Exhibit 2 at 25. This clause provides that "the contract price includes all applicable Federal, State, and local taxes and duties." 48 CFR 52.229-03 (2005).

The Project was located on land occupied by the Navajo Nation. The Navajo Nation imposes a business activity tax (NBAT) on the gross receipts received by companies from work on its land. The contract included a special notice on page 4 which warned the successful bidder about the NBAT. The special notice also identified the NBAT rate for 2005 as 3% and cautioned the successful bidder to contact the appropriate tax office for further information concerning this tax prior to submitting a bid. Appeal File, Exhibit 2 at 4; JSUF ¶¶ 6, 9; Respondent's Motion at 3. The contract did not include any provision for

[1] The parties have filed a joint statement of uncontested facts and accordingly, the following facts are undisputed, unless otherwise indicated.

adjustment of the fixed contract price for an increase in the NBAT.

Specifically, the special notice stated:

> A three percent Navajo Nation Business Activity Tax is applicable to work covered by these specifications. To obtain information, contact:
>
> Navajo Tax Commission
> PO Box 1903
> Window Rock, AZ 86515
> Telephone 520-871-6683
>
> Federal, State and Local taxes, including New Mexico Gross Receipts tax, are also applicable.

Appeal File, Exhibit 2 at 4. The special notice did not guarantee the NBAT would remain at the 2005 rate, and there is no evidence in the record that BOR had any information concerning the Navajo Nation's tax policies or plans to increase the NBAT after 2005.

GZC's bid price included 9.063% for taxes, which included 3% NBAT. JSUF ¶ 7. According to GZC, it interpreted the special notice as representing the NBAT would remain 3% during contract performance. JSUF ¶ 7; Affidavit of Stephen Hickman (Oct. 30, 2008) ¶ 4; Appeal File, Exhibit 16. The record contains no evidence that GZC made any inquiries to the Navajo Tax Commission concerning the NBAT or discussed the NBAT with BOR prior to submitting its bid. Nor does GZC offer any explanation as to why it could not have discovered on its own that the NBAT was subject to increase after contract award.

The contract also incorporated by reference FAR clause 52.243-04, Changes (August 1987), and FAR clause 52.233-01, Disputes Alternate 1 (October 2003). Appeal File, Exhibit 2 at 25.

Ms. Michaela Nelson was the Contracting Officer (CO) responsible for administering this contract. Appeal File, Exhibit 2 at 2. Shortly before contract award, Ms. Nelson informed GZC that Mr. Jay Decker would act as the alternate contracting officer's representative (COR). *Id.*, Exhibit 21. Ms. Nelson also cautioned GZC, in pertinent part, that Mr. Decker, as the alternate COR, lacked authority to:

> 1. Award, agree to, or execute any contract modification, or notice of intent; [or]

2. Obligate, in any way, the payment of money by the Government . . . .

Id.

Mr. Robert Brown, an electrical engineer with BOR, was also assigned to this Project. Appellant's Motion at 3, 4. Mr. Decker was Mr. Brown's supervisor. Affidavit of James Eichel (Oct. 30, 2008), Exhibit. There is no evidence in the record that Mr. Brown had authority to modify the contract price.

During the second year of contract performance, GZC received notice that the Navajo Nation would increase the NBAT from 3% to 4% effective July 1, 2007. JSUF ¶ 9; Appeal File, Exhibit 9 at 3. GZC acknowledges that it did not anticipate any increases in the NBAT in its bid. Hickman Affidavit ¶ 4; Appellant's Motion at 2.

In June 2007, Mr. James Eichel, the project manager for GZC, raised the issue of extra compensation for the 1% increase in the NBAT with Mr. Brown. Eichel Affidavit, Exhibit. Mr. Eichel inquired about the possibility of a contract modification for the1% increase in GZC's costs. *Id*. Mr. Brown forwarded Mr. Eichel's question to Mr. Decker. *Id*. Mr. Decker responded to Mr. Brown via e-mail. *Id*. Mr. Decker stated: "[w]hen and if the tax is increased a modification will be issued based on the evidence the tax has been increased." *Id*. This response was forwarded by Mr. Brown to Mr. Eichel. *Id*. Mr. Brown also expressed a similar opinion to Mr. Eichel. *Id*. There is no evidence in the record that Ms. Nelson authorized these communications or otherwise approved an increase in the contract price to compensate GZC for the additional 1% NBAT paid to the Navajo Nation.

On April 14, 2008, GZC forwarded to the contracting officer a request for an equitable adjustment seeking an increase to the contract amount due to the 1% increase in the NBAT. Appeal File, Exhibit 9. Accompanying this letter were three attachments, including a spreadsheet. *Id*. The spreadsheet identified the 1% increase in the NBAT as $16,019.44. *Id*. The spreadsheet also listed tax payments by GZC to the Navajo Nation for the period September 2007 to May 2008. *Id*. GZC's claim amount is also easily calculable by multiplying the tax payments listed on the spreadsheet by 1%.

Ms. Nelson responded on May 6, 2008, denying GZC's request and stating that the contract is a firm, fixed-price contract and as such, the risk is on GZC to take full responsibility for all costs. Appeal File, Exhibit 12. Ms. Nelson's letter did not state that it was a "final decision," nor did it contain the notices of appeal and other contractor rights required by regulation for a CO's decision.

Believing that the May 6, 2008, letter from the CO was not a final decision, GZC wrote to Ms. Nelson on May 14, 2008, requesting a final decision on its request for reimbursement of the additional 1% NBAT paid to the Navajo Nation. Appeal File, Exhibit 13. GZC alleged that the additional 1% NBAT constituted a change to the contract. *Id*. Ms. Nelson did not respond to GZC's letter.

On July 17, 2008, GZC wrote to Ms. Nelson, supplementing its request for final decision "for costs incurred to comply with the increase in sales tax by the Navajo Commission from 3% to 4%." Appeal File, Exhibit 14. GZC's letter stated "[o]ur costs for purposes of this claim are $16,019.44 . . . ." *Id*.

When GZC did not receive a reply to its July 2008 letter, it filed an appeal with this Board. The notice of appeal, dated July 31, 2008, referenced GZC's letter dated May 14, 2008, and stated in relevant part: "[t]he undersigned contractor appeals . . . from the deemed denial of the Contractor's Request for Final Decision . . . ." Notice of Appeal.

Discussion

Jurisdiction

Appellant appealed the deemed denial of its claim for an equitable adjustment in the amount of $16,019.44. The Government argues that the Board lacks jurisdiction to consider this appeal. According to the Government, appellant's May 14, 2008, letter failed to include a proper claim under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2006) (CDA).

Under the CDA, "[a]ll claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). A claim is a written demand by a party "seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 CFR 2.101 (2006); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc).

The Government alleges that appellant's May 14, 2008, letter is jurisdictionally defective because it fails to state a sum certain. We disagree. Although appellant's May 14, 2008, letter did not repeat the specific dollar amount claimed by appellant, the letter made clear that appellant was seeking reimbursement of the additional 1% NBAT paid to the Navajo Nation. Appellant's spreadsheet identified the 1% as $16,019.44. The claim amount was also easily calculable by multiplying the tax payments listed on the spreadsheet for the period September 2007 to May 2008 by 1%. We find the CO had sufficient notice as to the

dollar amount being sought by appellant. Where the contracting officer is aware of the underlying basis of the claim and the underlying facts giving rise to the claim, the Board will find that the contracting officer has received adequate notice of the claim. *PAE GmbH Planning & Construction*, ASBCA 39749, et al., 92-2 BCA ¶ 24,920, at 124,255. Since appellant's claim was a demand for a dollar amount which can be easily calculated, it meets the requirement for a claim submission containing a "sum certain." *Allstate Products Co.*, ASBCA 52014, 00-1 BCA ¶ 30,783, at 152,020. We reject the Government's contention that appellant's May 14, 2008, letter is jurisdictionally defective because it fails to state a sum certain. Respondent's motion to dismiss for lack of jurisdiction is denied.

Motions for Summary Relief

Appellant alleges that it is entitled to the additional tax because the special notice misrepresented the NBAT as 3% and failed to warn appellant that the rate may increase after contract award. Accordingly, appellant alleges a constructive change based on a defective specification and misrepresentation. Appellant also asserts entitlement to the additional tax based upon the assurances from two government employees.

The parties have submitted extensive briefs. The Board has considered all of their arguments, whether or not we mention or discuss them. The Government claims that it is entitled to summary relief since, as a matter of law, based on the terms of the contract, appellant's claim must fail. Appellant's motion for summary relief restates the arguments presented in its claim.

The Board is guided by the well-established rules applicable to summary relief motions. Summary relief is appropriate where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Although the onus is on the moving party to persuade us that it is entitled to summary relief, the movant may obtain summary relief, if the non-movant bears the burden of proof at trial, by demonstrating that there is an absence of evidence to support the non-moving party's case. *Id*.

Under Rule 56(e) of the Federal Rules of Civil Procedure, to which this Board looks for guidance, more than mere allegations are necessary to defeat a properly supported motion for summary relief. *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554, at 166,175 (citing *Fireman's Insurance Co. of Newark, N.J. v. DuFresne*, 676 F.2d 965 (3d Cir. 1982); *Tilden Financial Corp. v. Palo Tire Services, Inc.*, 596 F.2d 604 (3d Cir. 1979); *General Dynamics Corp.*, DOT CAB 1232, 83-1 BCA ¶ 16,386, at 81,459). The

parties are in agreement that there are no genuine issues of material fact for trial. Appellant's Motion at 5; Respondent's Motion at 2. Their differences are confined to the law and its application to the facts in this appeal. As appellant ultimately bears the burden of proving its allegations against the Government, the Government is entitled to summary relief if we conclude that appellant cannot establish one or more crucial aspects of each of its theories.

Misrepresentation or Defective Specification and Constructive Change

Appellant alleges constructive change to the contract due to misrepresentation and defective specification. Appellant's Motion at 4-8; Appellant's Reply Brief at 2.

A contractor may recover an equitable adjustment under the Changes clause using the theory of constructive change for both a claim of misrepresentation and defective specification. However, the doctrine of constructive change requires fault on the part of the Government. *Metric Construction Co. v. United States*, 81 Fed. Cl. 804, 818 (2008). To receive an equitable adjustment for a claim of misrepresentation, appellant must show that the Government made an erroneous representation of a material fact that appellant honestly and reasonably relied upon to its detriment. *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 729 (Fed. Cir. 1997). To receive an equitable adjustment for a defective specification claim, appellant must show that it was misled by an error in the specification. *Clearwater Constructors, Inc. v. United States*, 71 Fed. Cl. 25, 32 (2006).

It is undisputed that the contract was a fixed-price contract and incorporated by reference FAR clause 52.229-3, Federal, State and Local Taxes (April 2003). Appeal File, Exhibit 2 at 25. It is well-established that absent a special adjustment clause, a contractor with a firm, fixed-price contract assumes the risk of increased costs not attributable to the Government, including situations of post-contract non-federal tax increases. *B & M Cillessen Construction Co. v. Department of Health and Human Services,* CBCA 1110 (Feb. 9, 2009); *Professional Services Unified, Inc.*, ASBCA 48883, 96-1 BCA ¶ 28,073 (1995); *Intelcom Support Services, Inc.*, ASBCA 36815, 90-2 BCA ¶ 22,818; *R.B. Hazard, Inc.*, ASBCA 35752, 88-3 BCA ¶ 20,873. This clause unambiguously places responsibility squarely on potential bidders to include all applicable taxes in their bids. *Hunt Construction Corp. v. United States*, 281 F.3d 1369, 1372-73 (Fed. Cir. 2002). To fulfill this responsibility, prospective contractors are responsible for conducting sufficient investigation to ascertain the existence or nonexistence of taxes. *GarCom, Inc.*, ASBCA 55034, 06-1 BCA 33,146 (2005). Appellant admittedly assumed that the NBAT would remain 3% during contract performance, and has offered no evidence it conducted any sort of investigation to reasonably justify this assumption.

Appellant argues that it is not bound by FAR 52.229-3 and is entitled to summary relief due to the Government's misrepresentation and defective specification. According to appellant the special notice misrepresented the NBAT as 3% during contract performance and failed to warn appellant that the rate may increase after contract award. We find this argument unpersuasive.

If the Government makes a representation regarding taxes, it is held responsible for the accuracy of that representation. *Holmes & Narver Constructors, Inc*., ASBCA 52429, et al., 02-1 BCA ¶ 31,849, at 157,395. We find it undisputed on this record that the Government made no misrepresentation to appellant concerning the NBAT. The special notice accurately stated that the NBAT was 3% at the time of contract award in 2005. The contract did not warrant the NBAT would remain 3% as represented by appellant. Rather, the contract requires appellant to pay the NBAT, regardless of future increases, thus leaving it up to appellant to investigate its liability for the NBAT. Having found that the Government made no misrepresentation to appellant, we must also find that appellant could not have relied to its detriment on a misrepresentation never made. We also find for the same reasons that the special notice cannot be found to be defective. Appellant simply made a judgmental mistake in its bid. This mistake is not compensable.

We find no merit in appellant's argument that the change from 3% to 4% "is a change to the contract." A "change" to the contract that would warrant an increase to the firm, fixed-price contract requires that the change be actually or constructively caused by the Government. *M.A. DeAtley Construction, Inc. v. United States*, 71 Fed. Cl. 370, 376 (2006). We find it undisputed on this record that there was no Government-caused formal or constructive change to the contract, as it was the Navajo Nation, not the Government, that caused appellant to incur increased costs.

We hold that, on the record before us for purposes of the Government's motion, there are no disputed material facts and the undisputed facts fail to support appellant's theory of constructive change due to misrepresentation and defective specification. The Government is, therefore, entitled to judgment in its favor as a matter of law.

Authority to Bind the Government

Appellant seeks relief based upon the alleged oral agreements made by two BOR employees. Appellant's Motion at 7. Appellant asserts that these employees represented that a modification would be issued for the tax increase. *Id*.

It is well settled that the Government is bound by only those agreements of its agents that are within the scope of their actual authority and not contrary to statutory and regulatory requirements. *Maykat Enterprises, N.V.*, GSBCA 7346, 84-3 BCA ¶ 17,510. Appellant has not provided any evidence that the CO, the only person with contractual authority to modify the contract, promised or otherwise guaranteed appellant that the Government would reimburse appellant for the additional 1% NBAT paid to the Navajo Nation. Without the consent of an authorized government employee, no enforceable contract modification arose. At this summary relief stage, the Board has determined that Mr. Decker and Mr. Brown lacked actual authority to bind the Government to the contractor-proposed modification. The Government is, therefore, entitled to judgment in its favor as a matter of law.

Decision

Respondent's motion to dismiss for lack of jurisdiction is denied. Appellant's motion for summary relief is denied in its entirety. Respondent's motion for summary relief is granted. This appeal is **DENIED**.

JEROME M. DRUMMOND
Board Judge

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