



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT’S MOTION FOR SUMMARY RELIEF GRANTED IN PART;
RESPONDENT’S MOTION FOR SUMMARY RELIEF DENIED: April 19, 2013

CBCA 2862

TURNER CONSTRUCTION COMPANY,

Appellant,

v.

SMITHSONIAN INSTITUTION,

Respondent.

Douglas L. Patin and Jeremiah S. Regan of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Peter M. D’Ambrosio and Todd M. Conley of Womble Carlyle Sandridge & Rice, LLP, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS, McCANN, and KULLBERG.**

SOMERS, Board Judge.

More than a decade ago, the Smithsonian Institution (SI or the Smithsonian) sought to modernize and expand the National Museum of American History. In order to achieve that goal, the Smithsonian contracted with Turner Construction Company (Turner) to provide of various design and construction services in a long-term, multiple-phase project entitled “Public Space Renewal Project at the National Museum of American History.” The project involves two contracts, amended by several modifications.

The issue before us in this case involves the final contract price. The Smithsonian contends that the parties agreed on a total price, established by contract modification, which was a not-to-exceed price beyond which Turner may not recover the costs of construction. The contracting officer rejected Turner's claim for an equitable adjustment on the basis that it would exceed the final price. Conversely, Turner asserts that SI failed to negotiate a final fixed-price contract, thus breaching the contract requirements.

Turner and the Smithsonian filed an extensive joint statement of undisputed facts, as well as separate statements of undisputed facts, statements of genuine issues, and cross-motions for summary relief.¹ For the reasons set forth below, we grant Turner's motion for summary relief in part and deny the Smithsonian's motion for summary relief.

Background

The Skidmore, Owings and Merrill Contract

On May 20, 2002, SI awarded a contract to Skidmore, Owings & Merrill LLP (SOM). The request for proposals which led to the contract informed prospective contractors that the Smithsonian was "seeking proposals from experienced architect-engineering firms to lead a design/build team for the National Museum of American History Public Space Renewal Project." The design and construction services were divided into seven separate phases. The first phase was the "Concept Phase," and the contract identified a total firm-fixed price of \$250,000 for that initial work. The contract also identified six additional construction/design phases as options.

Section A.1 of the SOM contract also includes the following description of the "Contract Documents":

¹ In addition, Turner filed a motion to strike Exhibit 40 from the joint appeal file. Exhibit 40 consists of excerpts from Turner's Request for Equitable Adjustment (REA). Turner contends that it prepared the document for settlement purposes and that the document is inadmissible pursuant to Federal Rules of Evidence 408. The Smithsonian objects, arguing that the document is not privileged, or, alternatively, that Turner waived the privilege by relying upon the document in its certified claim and its complaint. Although we did not find the document necessary to reach our resolution, the fact that the document forms the underpinning of Turner's certified claim means that Turner cannot assert the privilege without bringing into question the validity of its certified claim. We deny the motion to strike.

A.1. The Contract Documents. The Contract consists of the Smithsonian Institution Document, including the Schedule and the following documents that are included either in full text or by reference, with full force and effect as if attached to the Contract.

* * *

A.1.6. Smithsonian Institution Construction Contract Clauses (Fixed Price), OCON Form 6 (June 2001).

* * *

A.1.7. Smithsonian Institution Architect-Engineer Contract Clauses (Fixed Price), OCON Form 8 (June 2001).

The Smithsonian Institution Construction Contract Clauses (Fixed Price), OCON Form 6 (June 2001) include standard Federal Acquisition Regulation (FAR) fixed price contract clauses, including FAR 52.232-5, Payments Under Fixed-Price Construction Contracts (May 1997). Similarly, Smithsonian Institution Architect-Engineer Contract Clauses (Fixed Price), OCON Form 8 (June 2001) include a variety of standard FAR fixed price contract clauses, including FAR 52.232-10, Payments under Fixed Price Architect-Engineer Contracts (Aug. 1987) and FAR 52.243-1, Changes, Fixed Price, Alternate III (Apr. 1984).

In early 2004, the parties agreed that the contract with SOM would be novated and that Turner would assume the responsibilities under the SOM-SI contract. On February 12, 2004, SI executed Modification 0003, which spelled out that agreement. The modification bound Turner to the contract provisions.

The Turner Contract

On September 29, 2005, the Smithsonian Institution awarded Turner contract number F0536CW10520, entitled “Revitalize National Museum of American History (NMAH), Behring Center, Public Space Renewal, Package II-B,” with a contract price of \$10,645,174.26.12. The contract identified this amount as a “not-to-exceed price” for the following services performed “under this work order contract: (1) A/E Design - \$4,109,719.16; (2) Long lead item requisitioning - NTE \$ 6,000,000.00; (3) Soft Demolition NTE \$ 535,454.96.”

The contract contained the following provision concerning contract disputes:

CLAIMS: “Claims”, as used in this clause, means a written demand or written assertion by one of the contracting parties 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 this contract. A claim arising under the contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant.

Modification 0001

On July 17, 2006, the parties executed Modification 0001 to “include amended specifications and additional requirements.” It further stated that “[t]he total funding and amount for [certain design requirements], not including funding previously provided in the original contract, is a [sic] not-to-exceed (NTE) \$4,688,156.19.” The modification also stated that “\$16,000,000.00 in funds is awarded for future construction work.” The modification concluded that the total pricing amount of the contract “is increased by NTE \$20,688,156.19 from \$10,645,174.26 to NTE \$31,333,330.45.”²

Completion of 95% Construction Documents

On September 16, 2006, Turner completed its 95% construction documents. After a series of meetings with SI in October 2006, Turner presented its 95% construction documents pricing to SI on November 17, 2006. SI reviewed this document and returned it to Turner with comments, and Turner resubmitted the document to SI on November 21, 2006.

On December 4, 2006, Lloyd McGill of SI sent the following e-mail message to Bill Wright of Turner:

² Most of the bilateral modifications contain a statement entitled “Contractor’s Statement of Release.” Although such a statement could be construed to release SI from all claims arising from the various modifications, the fact that the parties continued to negotiate indicates that the releases held no meaning for the parties. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993); *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799. In any event, we conclude that the releases do not present an issue here, noting that the parties did not address the potential relevance of release statements in any of their submissions to the Board.

This correspondence is to provide notice to proceed (NTP) with additional construction services for the Public Space Renewal Project (PSRP) under Contract F0536CW10520 at the Behring Center, National Museum of American History. Funds in the amount of \$22,405,909.04 are being provided for continued construction activities. A formal modification will be issued to definitize activities.

The next day, the contracting officer, Dorothy Leffler, sent the following e-mail message to Bill Wright:

This correspondence is to provide notice to proceed (NTP) with additional construction services for the Star Spangled Banner Shell Construction under contract F0536CW10520 at the National Museum of American History, Behring Center. Funds in the amount of \$4,725,818.00 are being provided for continued construction activities. A formal modification will be issued to definitize these activities.

Modification 0007

On December 27, 2006, the parties executed Modification 0007. The modification stated, in part:

A.1. This modification is issued to provide additional undefinitized funding for construction of the Public Space Renewal and the Star Spangled Banner Projects (PSRP/SSB).

A.1.1. This is a funding action only [sic] is not intended to represent a total firm fixed amount obligation on the part of the Contractor.^[3]

A.2. Once construction activities are definitized, funding will represent a firm fixed price contract amount.

A.3. The Contractor shall perform construction services in accordance with the 95% drawing documents issued by the Architect/Engineer, dated September 10, 2006.

³ The parties dispute the impact and meaning of the modification language, and it is not clear to us what is meant by a “firm fixed amount obligation on the part of the Contractor.”

....

C. The total contract funding and amount is increased by \$27,504,031.04.00 [sic] from, \$32,284,727.20 to \$59,788,758.24 (NOTE: The total funding and amount includes funds provided for design services. Once pricing for construction services is finalized, design funds will be referenced only).

The parties agree that because Turner and SI were in the process of negotiating the 95% construction documents price as of December 27, 2006, Modification 0007 did not establish a fixed construction price.

Modification 0008

On January 19, 2007, Turner submitted its revised cost proposal for the 95% construction documents, proposing a total price of \$60,755,350 -- i.e., \$51,823,836 for construction, \$8,814,609 for design, and \$116,905 for early packages construction administration cost. Based upon this price, there was a \$966,591.76 shortfall in the total construction price set forth in Modification 0007.

On February 22, 2007, SI unilaterally executed Modification 0008, which increased the total contract funding and amount by \$966,592, to a total price of \$60,755,350.24, the price proposed in Turner's January 19, 2007, 95% construction documents submission. Modification 0008 stated, among other things:

A.1. This modification is issued to provide additional funding for construction for the Public Space Renewal and Star Spangled Banner Projects (PSRP/SSB).

A.1.1. This is a funding action only.

Modifications 0009 through 0015

Between March 26, 2007 and July 31, 2007, the parties executed Modifications 0009 through 0015.⁴ These modifications increased the total contract funding amount from \$60,755,350.24 to \$69,485,734.24. Turner invoiced SI for its work through the submission of progress payment applications, and SI paid Turner accordingly.

⁴ Modification 0012 was a unilateral modification issued by SI. Both parties executed the other modifications.

Modification 0016

In an undated letter sent on July 19, 2007, Ms. Leffler, the contracting officer, indicated her concern that certain amendments developed by SOM “have major implications, which if not acted upon, will seriously jeopardize the projected completion and scheduled opening of July 4, 2008.” She directed Turner to evaluate these changes and explained that she had authorized \$1.5 million to be set aside to be used to modify the contract once the potential changes had been evaluated and the Smithsonian reached “a fair and reasonable conclusion as to its ownership.”

Turner responded in a letter dated August 21, 2007, that it believed:

[W]e are currently working under a contract that is undefinitized relative to cost and this has been confirmed in Modification #7 and has been reconfirmed in Modification #16. The path to definitizing the cost and pricing for the contract is somewhat complicated and the path forward after the definitization (as to what constitutes a change) will also require some discussion. We will continue to advance the project within the available funding and will continue to notify SI when we believe additional funding is required.

On September 10 and 11, 2007, the parties executed Modification 0016, which established a substantial completion date of June 20, 2008. It stated, in pertinent part:

B. With regard to the contract price, Modification 0007 stated, “This is a funding action only and is not intended to represent a total firm fixed price amount obligation on the part of the Contractor,” therefore leaving a large portion of the contract amount undefinitized.

B.1. Subsequent to Modification 0007, Modifications 0008 and 0012 have been issued to provide additional undefinitized funding; however, Modifications, other than those cited, represent a firm-fixed price commitment on the part of the Contractor for performing the work that has been definitized or described in associated changes; however, it is agreed that the construction activities for total funds available on the contract have not been completely definitized.

B.2 Both parties agree that it is in the best interest of the project to definitize the project as early as is possible so that our project teams have clarity on this matter. As such, both parties agree to expend reasonable efforts to negotiate a definitized contract amount which shall incorporate all work up to a date

selected mutually by the parties. Both parties shall endeavor to conclude such negotiations by August 30, 2007 [sic].

Prior to signing Modification 0016, Mr. Jahrling of Turner wrote to Lloyd McGill of SI on September 9, 2007, stating, in part:

I have reviewed the document and in general the document accomplishes the two missions we both wanted to do. First, it establishes the substantial completion date as June 20, 2008. It has the POP [period of performance] at June 20th as well, but acknowledges that the work will continue past this date . . . I believe that later you will have to adjust the POP to allow the work to continue past this date. On the funding and pricing side, the situation is complex to be sure, but the wording you have included is close enough for now. As discussed and agreed to earlier, while there have been a bunch of “lump sum” changes agreed to, we are not accounting for these changes on an individual basis. They are lump sum components assumed to be the pieces of the project that we have agreed upon and will not be allowed to change in pricing as we work on definitizing the entire contract in the coming weeks.

Unless you have any disagreement, I will sign this modification and forward it to you.

Mr. McGill wrote back on September 10, 2007, saying that “[e]veryone is in agreement with your statements. Let’s move on.” As noted above, both parties signed the modification.

Addenda 1-4 to the 95% Construction Documents

Although the parties had planned to conclude construction-work scope and cost negotiations for Addenda 1-4 by the August 30, 2007, target date, this did not happen. As of September 11, 2007, the parties were negotiating the work scope and price of Addenda 1 and 2 to Revision 7 to the 95% construction documents. Also, the parties continued to negotiate the work scope and price of Addenda 3 and 4.

In a letter dated September 19, 2007, the contracting officer, Dorothy Leffler, stated, in pertinent part:

This is to confirm Smithsonian Institution (SI) request of 9/11/07 to Turner Construction Company (TCCo) to provide a list of possible options to reduce the project overall cost.

SI's review of the recent addendum proposals and TCCo's allowances, which have cost impacts on the project budget has revealed that the present value of the project exceeds the design-build price of \$55,959,054. This figure does not include the design cost of the design-build price.

Per Contract F-0536CW10520 Part XII - Construction Cost Limitation/Revisions (C), SI hereby directs TCCo to provide a "shopping list" of options to reduce the scope of work for the PSRP II project. TCCo is to provide costs associated with each line item. It is understood that some of the items listed could be deferred and installed at a later date. The schedule for the installation is to be determined.

SI requests TCCo to provide a firm fixed price for the following TCCo outstanding allowances including, but not limited to: Design contingency, Demolition of walls within 'Field to Factory', CWAS system, Hazmat Abatement, Removal and replacement of ceilings, Patch fire rated partitions, and submit the list of suggestions to correct scope to be within the design-build price by Tuesday, 9/25/07. It is the intent of SI to select the acceptable options by Tuesday 10/2/07 and request TCCo to revise the project documents accordingly.

The parties agree that, prior to that date, SI had never communicated to Turner that there was a "design-build price of \$55,959,054." SI did not explain how the \$55,959,054 was calculated. It appears, however, that the contracting officer believes that \$55,959,054 is the maximum contract price, which is inconsistent with earlier statements.

In response, Mr. Jahrling sent Ms. Leffler an e-mail message on September 20, 2007, stating, in part:

1. You note a number of \$55,959,054 as a design build price which appears as the target to reach for the value engineering exercise. I would like to clarify that this is so, since almost a year ago, the 95% estimate was \$58,036,962 and a number of items have been added since including asbestos, etc. So to clarify, we are to attempt to reach the 55.9 number INCLUDING all of the other added changes, etc.?
2. The discussions for Addendums #1 through 4 are apparently going to be held on Tuesday as well...this will be good so that we will all know what we are up against...could be \$6-10 million.

After much discussion and e-mail messages back and forth about what to do, Mr. Jahrling wrote in a letter dated October 18, 2007, that:

With that January 19th letter, we asked two important questions that were never answered by SI:

1. What are the steps to get a modification issued and steps to get a firm fixed price contract in place?
2. Do you want another copy of the Turner proposal which would include all of the qualifications and assumptions?

It is clear in all of the correspondence and all actions that SI has never officially dealt with the 95% estimate in anything but a piecemeal approach and the project today continues undefinitized relative to cost. In one of our recent meetings you asked the question out loud “What is the baseline (cost)?” and I replied that there is none...that remains true today, and until your request in one of the following meetings for us to issue a proposal to definitize the costs, there has been no action toward definitization since the 95% estimate was delivered in January 2007.

DEFINITIZING THE CONTRACT

Based on all correspondence and all actions, the contract between Turner and SI remains undefinitized relative to cost. As work is proceeding, we maintain that we are currently working on a Cost-Type basis for all elements of the work that are not definitized and will continue to do so until the contract is definitized between the parties.

Modification #7 issued in December of 2006, contemporaneous with the ongoing pricing work described above clearly states that “This is a funding action only and is not intended to represent a total firm fixed amount obligation on the part of the Contractor.” Clearly SI understood that there was no fixed amount (contract undefinitized relative to cost) at that time, and no actions have been taken since (excepting your recent request for a proposal to definitize) to fix the costs.

Modification #16 issued in September 2007 again reiterated that a “large portion of the contract amount is undefinitized.”

In a series of e-mail messages dated October 19, 2007, to October 21, 2007, the parties continued discussing pricing for Addenda 1-4. In an October 19, 2007, e-mail message, SI stated, in part:

The revised pricing for Addendums were just received from TCCo last week and are not to be linked to the delivery of the recovery schedule that was requested by letter over a month ago. SI's review of the Addendums shows that additional costs have been added with no or little qualifications. TCCo seems not to understand that the Not To Exceed price has been exceeded and TCCo correcting unjustified labor rates is not an invitation to correct apparent bid errors. These changes in the bid will only prolong the SI review.

In response, Turner stated in an October 21, 2007 e-mail message:

I understand your frustration, but I hope you can understand mine. I think everyone is clear that there was some confusion relative to the way the contract is coming together, but by now we should have gotten to the point where all understand that we should not be expected to fund millions of dollars in changes out of our pocket when we had never included them (actually specifically excluded them). The team's inability to come to closure on this is causing a great deal of strife within the entire team.

Relative to proceeding with certain parts of the project, my understanding is that we have a limited release to proceed with Amendments 1 and 2 not to exceed \$1,500,000 but it is also my understanding that we have not been allowed to bill for this work. It is also my understanding that we have not been released to go forward with Amendments 3 and 4. Closure on these issues is critical to forward progress.

SI's Derek Ross replied on October 22, 2007:

Of the \$1.5M you have approx \$815K that is in the contract that you could bill against and after reviewing the corrected documents for Add #3 and #4 we are processing those modifications. You did receive NTP for Add #4 back in August. I understand you have released the gear for Add #3 that pricing includes acceleration cost.

By e-mail message dated October 23, 2007, to Mr. Ross, Mr. Jahrling submitted a Financial Status Report dated September 25, 2007, showing total funding for the contract

through Modification 0018 to be \$69,696,353. This communication showed the total estimated costs to be \$82,706,320 – a shortfall of \$13,009,967. The letter also states, in part:

The “Contingencies to Complete” section I had Bill put in to show what additional costs one might expect to spend to completion on this project. Clearly how these costs are tracked will depend upon whether we reach an agreement on a definitized contract amount which may include all design and construction contingencies or whether we continue along the current path. In a complicated renovation project such as this, there must be some recognition that additional cost events will occur. Between us, we need to clearly identify for the team who is responsible for what in a general sense so that they can work better together rather than battling over every cost event.

On the Allowances, I know that SI would like to definitize the allowances, but we cannot support definitizing the Hazardous Material Allowance and we probably have not seen the end of the Remove and Replace existing ceilings to remain.

On October 28, 2007, Mr. Jahrling sent to Mr. Ross a revised financial status report. At page 2 of the report, under “Total Additional Funding Required (Total Estimated Cost Less Total Funding Received thru Mod 15),” it showed a shortfall of \$9,558,018 from the projected cost of \$79,254,371. SI provided its comments to Turner by transmittal dated November 9, 2007.

On March 11, 2008, Turner met with Robert Fraga, the newly assigned contracting officer, and his staff, to review the contract and attempt to amicably resolve the parties’ disagreements over contract pricing. The contracting officer asked Turner to put its position in writing and stated that he would issue a determination on what the contract required.

By letter dated March 27, 2008, Turner explained its position to SI. Referring to Modifications 0007 and 0016, Turner stated:

[The] Smithsonian clearly understood that a definitized contract amount was to be negotiated. This has not happened yet.

To date, only \$14,707,748 in scope has been definitized. Turner and the Smithsonian must still negotiate and definitize the balance.

On April 7, 2008, Mr. Fraga issued his determination on the contract requirements. He concluded that the contract was a fast track, design-build contract with incremental

funding. While Mr. Fraga acknowledged that providing additional funding to the project without allocating funds to specific work activities might be administratively confusing, those actions did not relieve Turner from constructing the project for the not-to-exceed amount identified in Modification 0001. Mr. Fraga also stated that “the failure to reach a negotiated settlement at 95% documents was primarily due to [Turner’s] failure to deliver a timely and complete set of documents and the Smithsonian’s unwillingness to accept [Turner’s] Assumptions and Clarification associated with the 95% package. Nevertheless, construction work has continued in the absence of the negotiated settlement.” Mr. Fraga directed the parties to negotiate a firm fixed price agreement that took into account differing site conditions, scope increases, owner generated changes, and extended overhead due to owner delays.

On April 15, 2008, Mr. Fraga amended his previous letter. In response to comments apparently raised at a meeting held on April 7, 2008, he clarified:

[Turner’s] representatives disagree with my interpretation that the contract is a “not to exceed, guaranteed maximum price type contract.” It is true that the terms “not to exceed” or “guaranteed maximum price” are not found in the contract but this is clearly the intent of the contract and it is supported by the contract language and its implementation.

The pricing of the construction portion of this contract can only be one of three options: fixed price, not to exceed guaranteed maximum price, or cost reimbursable. This is clearly not a fixed price contract.

....

The scope of the work for the project was defined by a number of documents early in project development, including OFEO’s [Office of Facilities Engineering and Operations’] statement of work provided to SOM and the original and revised 35% documents. These documents established the scope of work and were the basis for Modification #1. Consistent with a not to exceed guaranteed maximum price contract, the scope of work continued to be refined through further design development in the 65%, 95%, and finally the 100% submissions. Scope reductions were made through negotiations to keep the project within budget.

Mr. Fraga concluded by confirming that his earlier determination remained unchanged. As a result of contract modifications issued unilaterally by SI, the contract amount increased

from \$69,485,734.48 to \$75,030,697.77. Ultimately, Turner substantially completed the project on October 31, 2008, and the museum opened to the public in November 2008.

On May 24, 2011, Turner submitted a certified claim for \$14,527,695. Contracting officer Dorothy Leffler denied the claim in its entirety on June 5, 2012. First, she reviewed the contracts and associated documents, concluding:

I find that the plain language in the contracts and associated documents clearly demonstrates that these design/build contracts were Fixed Price in nature, with the Fixed Price for the construction work to be negotiated after Turner prepared its 95% CD Estimate.

The contracting officer explained the Smithsonian's process of incrementally funding the contract, stating:

SI's funding for the Project work was provided, in large measure, by a single private donor. Because the private donor provided the Project funding incrementally throughout the Project, SI had to also incrementally fund the contracts with SOM and Turner in order to avoid incurring obligations in excess of its available funding. As a consequence, SI incrementally definitized the fixed prices for various elements of the contract work, and also used fixed "not-to-exceed" ("NTE") prices to avoid incurring obligations in excess of the funds available at any given time.

SI used modifications to increase the fixed-price contract amount as necessary. The contracting officer determined that this process did not change the fixed-price nature of the contract.

The disputes clause of the contract states that the decision of the contracting officer is final and conclusive unless within thirty days from the date of receipt of the decision, Turner mails or otherwise furnishes the contracting officer a written appeal addressed to the Secretary of the Smithsonian Institution. A memorandum of understanding provides that the United States Civilian Board of Contract Appeals will act as the Secretary's duly authorized representative for the determination of any administrative appeal from the decision. Accordingly, upon receipt of the contracting officer's final decision, Turner appealed the decision to the Board.

Discussion

The parties conceive of the issue on appeal quite differently. Turner argues that SI failed to definitize the contract and negotiate a firm fixed price as contemplated by the contract. Specifically, when Turner submitted its 95% proposal in accordance with the contract, it contends that the parties never definitized the contract value. While the parties had reached agreement on fixed prices for a portion of the work, the vast majority of the construction work remained “undefinitized” with no agreement on the total lump sum price. Turner contends that SI added work, deleted work, and changed previously designed work. Turner believes that it is entitled to receive a reasonable price for the work which remained undefinitized under the contract. In sum, Turner says, the plain language of Modifications 0007 and 0016, combined with the parties’ contemporaneous conduct, demonstrate that the parties intended to reach a firm fixed price.

By contrast, the Smithsonian insists that it accepted Turner’s fixed price proposal when it issued Modification 0008 and set the contract price. Thereafter, the parties’ conduct, including Turner’s applications for payment, change requests, and request for equitable adjustment, were all consistent with a fixed price agreement. SI contends that Turner’s remedy is under the contract’s “equitable adjustments” and “disputes” clauses.

This dispute requires us to determine whether the parties agreed on a price for the construction work in accordance with the contract’s terms. If the parties did not so agree, then we must determine the consequences, if any, of the parties’ failure to negotiate a contract price.

Applicable Legal Standards

Summary relief is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment. *Id.* at 248. “When, as here, both parties have moved for summary relief, each party’s motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration.” *Charleston Marine Containers, Inc. v. General Services Administration*, CBCA 1834, 10-2 BCA ¶ 34,551, at 170,398 (citations omitted).

The issue raised by both parties involves interpreting the meaning of contract terms in the context of the original contract and the contract modifications. Contract interpretation is a legal question that is often amenable to summary disposition. *JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,478,

citing *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002). “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.” *Arcadis U.S., Inc. v. Department of the Interior*, CBCA 918, 08-1 BCA ¶ 33,807, at 167,353 (citations omitted). The determination of a contract type is also a matter of law, and the tribunal is not bound by the label attached to it by the parties. *JAVIS*, citing *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984).

Analysis

In this case, we are called upon to determine, based upon the language of the contract and the modifications to the contract, whether the parties agreed upon a fixed contract price. We find that they did not.

First, we note that the contract provided that the Construction Work Phase would be negotiated at the completion of the “95% Construction Documents.” It is undisputed that upon Turner’s completion of the 95% construction documents phase, negotiations on the Construction Work Phase had begun, but the parties had not yet “definitized” the total contractual amount for the construction services contemplated by the contract. This is confirmed by Modification 0016, where the parties agreed to “expend reasonable efforts to negotiate a definitized contract amount” by August 30, 2007.

Indeed, the evidence shows that the parties continued to negotiate to reach a final contract price, first focusing on the work scope and price for Addenda 1 and 2 to Revision 7 of the 95% construction documents, and later turning to the work scope and price of Addenda 3 and 4. The contracting officer asked Turner to provide options for reducing the overall project cost. Over the course of months, the correspondence reveals the parties’ efforts to try to definitize the scope and costs of the contract, as well as the extent to which they continued to disagree about contract price.

In our view, it is clear that the parties failed to agree on a “definitized contract amount,” as least as to certain portions of the contract. They never came to a meeting of the minds on the final contract price. Indeed, the parties agree that “SI and Turner did not conclude construction work scope and cost negotiations . . . by the August 30, 2007 target date.” Joint Statement of Uncontested Facts ¶ 45.

What is the significance of this fact? Turner urges that the Smithsonian’s failure to definitize a final price for construction services constitutes a breach of the contract. We disagree. The contract requires only that the parties “negotiate a definitized contract

amount.” This provision does not obligate the Smithsonian to accept a proposed definitized contract amount – it mandates merely that the parties try to come to agreement. Because “[a] contract term which allows for future negotiation ‘impliedly places an obligation on the parties to negotiate in good faith,’” the Smithsonian could only breach its obligation under this provision if it failed to act in good faith. *See, e.g., Gardiner, Kamya & Associates v. Jackson*, 369 F.3d 1318, 1322 (Fed. Cir. 2004) (citations omitted). Nothing in the record suggests that the Smithsonian failed to make a good faith effort to negotiate a contract price. Accordingly, we deny Turner’s motion for summary relief to the extent that it asks for a determination that the Smithsonian’s actions constituted a breach to the contract.

The fact that the Smithsonian did not breach its contractual obligation to negotiate a contract price, however, does not mean that Turner is without recourse to recoup the amount it seeks. The parties agree that their original intent was to negotiate a firm fixed price and scope of the construction work once Turner submitted the 95% construction documents to the Smithsonian. On this point, the Smithsonian argues that the final contract price was established through Modification 0008. SI also contends that the subsequent contract modifications, which increased the contract price from \$69,485,734 to \$75,009,526, support its argument that the contract was a firm fixed-price contract. However, SI also acknowledges that “because the parties were not able to agree on a price adjustment for Addenda 1 through 4 work,” SI unilaterally issued modifications to compensate Turner for additional work.

Whether or not the contract could be characterized as a firm fixed-price contract is beside the point. Turner could not have been clearer in its actions and correspondence throughout the process that it believed that the parties had not agreed on a price. Based upon an examination of the record, we find that the parties’ actions subsequent to the issuance of Modification 0008, and, in particular, the terms agreed to in Modification 0016, illustrate that the parties never reached final agreement on the contract amount. Indeed, the record makes plain that the parties never reached agreement on a maximum ceiling price for the project. While the plan may have been to negotiate a firm fixed-price contract, the parties never accomplished that task.

SI claims that in order for Turner to be entitled to be paid reasonable construction costs, we must determine that the contract is actually a cost reimbursement contract rather than a fixed-price contract. This is not correct. If the contract is a fixed-price contract, and the parties had actually reached agreement to a fixed price, Turner could still submit a claim for an equitable adjustment under the terms of the contract’s disputes provision. The fact that the contract has a maximum ceiling price does not preclude SI from considering a

properly submitted claim that seeks an equitable adjustment to the contract. Consideration of a claim for equitable adjustment, which is permitted under the contract, does not in and of itself change the contract from a fixed-price contract to a cost-reimbursement contract.⁵

SI asserts that the decision in *Arcadis* is instructive. It contends that the Board in *Arcadis* considered not only the language of the modifications, but also the parties' conduct, to determine that the Government's liability was limited to the contract price. A review of the facts of *Arcadis*, however, shows that the modifications in that case specifically referenced the contract price using "not-to-exceed" language. Only Modification 0001 in the contract at issue here contained "not-to-exceed" language to set a funding limitation for a contract amount. None of the subsequent modifications, including Modifications 0007, 0008, and 0016, uses any language that conveys a "not-to-exceed" ceiling price. To the contrary, none of the modifications after Modification 0001 identifies a firm fixed price as the maximum contract price. The relevant modifications, specifically Modifications 0007 and 0008, state that "[o]nce construction activities are definitized, funding will represent a firm fixed price contract amount." This statement is not the same as a statement clearly setting forth a "not-to-exceed" funding limitation.

⁵ In any event, even a cost-reimbursement contract has a maximum price. FAR Subpart 16.3, entitled Cost Reimbursement Contracts, states:

Cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.

Like a firm fixed-price contract, a ceiling price caps the amount of costs that can be claimed by the contractor absent a claim for equitable adjustment.

Decision

For the reasons set forth above, we **GRANT** Turner's motion for summary relief **IN PART**, concluding that Turner is entitled to be paid a reasonable amount for the work it performed on the project. We **DENY** the Smithsonian's cross-motion for summary relief.

JERI KAYLENE SOMERS
Board Judge

We concur:

R. ANTHONY MCCANN
Board Judge

H. CHUCK KULLBERG
Board Judge