ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Robertson & Penn, Inc.	)	ASBCA No. 55622
	)	
Under Contract Nos. DAKF40-97-C-0499	)	
DAKF23-94-C-0008	)	

APPEARANCE FOR THE APPELLANT:	James F. Nagle, Esq. Oles Morrison Rinker & Baker, LLP Seattle, WA
APPEARANCES FOR THE GOVERNMENT:	COL Anthony M. Helm, JA Chief Trial Attorney MAJ Christina Lynn McCoy, JA Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICKINSON ON APPELLANT'S MOTION FOR DECLARATORY RELIEF AND RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Appellant Robertson & Penn, Inc. ("RPI") operated the Government Owned/Contractor Operated laundry facility at Fort Campbell, Kentucky, under Contract Nos. DAKF23-94-C-0008 and DAKF40-97-C-0499. During performance of the latter contract, RPI was audited by the State of Tennessee and ultimately assessed state taxes. RPI alleges it is due reimbursement by the government for what RPI claims were after-imposed Tennessee state taxes in the amount of $659,257.71. The government denies liability for the taxes as a matter of law and further asserts as an affirmative defense that, even if it were to be found liable for the taxes, the portion of the taxes assessed by the State of Tennessee for the period prior to 17 July 2000 is time-barred by the six year statute of limitations in the Contract Disputes Act (CDA), 41 U.S.C.A. § 605(a).

RPI seeks declaratory relief from the Board in the form of a determination that its certified claim is not time-barred. In its opposition to the motion the government moves to dismiss the appeal for lack of subject matter jurisdiction (gov't opp'n, at 1). The government has also moved for summary judgment[1] arguing that, as a matter of law, RPI

[1] The first paragraph of the government's motion states that the government "moves to dismiss this appeal with prejudice for failure to state a claim upon which relief can

alone is responsible for the taxes assessed by the State of Tennessee. Both parties' motions have been fully briefed.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. RPI's president, Harold W. Robertson, was an experienced government contractor whose companies had performed the laundry operations contracts at Fort Campbell for 21 years and at various other military installations in at least ten states (app. opp'n ex. 1, ¶¶ 1-3). RPI had never included state sales or use taxes in its bids at military installations prior to the current contract (*see* SOF ¶ 20). The government had never indicated to RPI that it should include sales and use taxes in its bid. (App. opp'n, ex. 1, ¶ 5)

2. RPI operated the laundry facility at Fort Campbell under Contract No. DAKF23-94-C-0008 effective 23 October 1993 for a base period of six months and four 12-month option periods (app. supp. R4, tab 500). That contract incorporated by reference FAR 52.229-3, FEDERAL, STATE, AND LOCAL TAXES (JAN 1991) (app. supp. R4, tab 500 at I-3).

3. On 14 May 1997 the government issued Solicitation No. DAKF40-97-B-0007 for a firm fixed-price laundry operation contract at various Army posts (including a base period and four 12-month option periods) (R4, tab 1 at B-38a). The date set for receipt of bids under Solicitation No. DAKF40-97-B-0007 was 8 August 1997 (R4, tab 1 at B-38d, tab 4).

4. RPI's bid for Schedule II (Fort Campbell) (including the base year and four one-year options) was $861,550.65 (R4, tab 1 at B-37). On 29 August 1997 the contracting officer (CO) sent a letter to RPI advising that its bid was substantially lower than other bids and the government estimate. The letter further provided to RPI the total amounts of all the other bids for Schedule II. The two lowest other bids for Schedule II were $1,415,820.20 by Starlight Cleaners, Inc. and $1,529,401.35 by Crown National Services. RPI was requested to verify its bid and respond in writing if it was correct. (R4, tab 2) On 3 September 1997, RPI's president advised in writing that it had "re-evaluated" its bid and verified that it was "true and correct to the best of my knowledge and belief, and no corrections are necessary" (R4, tab 3). The CO thereafter determined RPI's bid price to be fair and reasonable (R4, tab 4 at 3). RPI's bid verification letter was incorporated into the contract by reference (R4, tab 1 at 2).

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be granted" (gov't mot. at 1). However, in the caption and throughout the rest of the motion the government refers to it as a motion for summary judgment. We treat it as a motion for summary judgment.

5. RPI was awarded firm fixed-price Contract No. DAKF40-97-C-0499 in the corrected amount of $861,550.50 for operation of the Government Owned/Contractor Operated laundry facility at Fort Campbell, Kentucky, with an effective date of 1 October 1997. The contract included a base year and four one-year options. (R4, tab 1) Option Year 4 was exercised for the period 1 October 2001 through 30 September 2002 (R4, tab 5). Fort Campbell is located on the Kentucky/Tennessee border and occupies space in both states (app. opp'n, ex. 1, ¶ 4). Apparently, the laundry facility is in Tennessee (app. supp. R4, tab 514 at 1).

6. The contract incorporated by reference FAR 52.229-3, FEDERAL, STATE, AND LOCAL TAXES (JAN 1991) (R4, tab 1 at I-20):

> (a) "Contract date," as used in this clause, means the date set for bid opening or, if this is a negotiated contract or a modification, the effective date of this contract or modification.
>
> "All applicable Federal, State, and local taxes and duties," as used in this clause, means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.
>
> "After-imposed Federal tax," as used in this clause, means any new or increased Federal excise tax or duty, or tax that was exempted or excluded on the contract date but whose exemption was later revoked or reduced during the contract period, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date. It does not include social security tax or other employment taxes.
>
> ….
>
> (b) The contract price includes all applicable Federal, State, and local taxes and duties.
>
> (c) The contract price shall be increased by the amount of any after-imposed Federal tax, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was

included in the contract price, as a contingency reserve or otherwise.

….

(h) The Government shall, without liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax when the Contractor requests such evidence and a reasonable basis exists to sustain the exemption.

7. The contract also incorporated by reference FAR 52.233-1, DISPUTES (OCT 1995)—ALTERNATE I (DEC 1991) (R4, tab 1 at I-28).

8. From at least April 1997 through March 2001, RPI filed Franchise, Excise Tax Returns with the State of Tennessee (app. supp. R4, tabs 504, 506-508). The Tennessee state sales and use taxes were established in 1947 (gov't mot. at 6 n.1; app. opp'n at 9). There is no evidence that RPI filed State of Tennessee use tax returns, sales tax returns or business tax returns during any of its many years of contract performance until audited.

9. On 20 February 2001 the State of Tennessee notified RPI that it had been "selected for audit for the Tennessee sales & use, business, and franchise, excise taxes" for "the period(s) of 12/1/94-02/28/01 for sales and use tax, 7/1/97-6/30/00 for business tax and 04/01/97-05/31/00 for franchise, excise tax" (app. supp. R4, tab 509 at 1). This was the first time RPI had been audited, assessed or sent notices of sales and use taxes by the State of Tennessee (app. opp'n, ex. 1, ¶ 9).

10. On 28 March 2001 RPI advised the contracting officer that the State of Tennessee had informed RPI of its intent to "impose and collect certain taxes not previously imposed or collected, in connection with [RPI's] performance" of both Contract Nos. DAKF23-94-C-0008 and DAKF40-97-C-0499. The letter further stated:

This letter will also advise you that unless the Contracting Officer can provide evidence establishing an exemption from the tax, as provided in FAR 52.229-3(h), [RPI] intends to submit a claim to the Government for any amount the State of Tennessee assesses against [RPI] in connection with the above referenced contract.

FAR 52.229-4(h) states that the Government shall furnish evidence appropriate to establish exemption from State or local tax when the contractor requests such evidence

> and a reasonable basis exists to sustain the exemption. In addition, FAR 29.201(c) states that it may not be in the best interest of the Government for the contractor to independently negotiate with a taxing authority to determine whether a tax is applicable.
>
> Any amount that may be assessed for Tennessee sales, use, property, or utility franchise tax was not included in the contract price, nor were such amounts included in previous contracts for this work. [RPI] acted reasonably when it assumed such taxes are not applicable to this contract, based upon past performance of this contract and the contracting officer's guidance.

(App. supp. R4, tab 511) There is no evidence the government responded to this letter. FAR 52.229-4(h), referenced by RPI in the second paragraph above, is inapplicable to the contract at issue as it only applies to noncompetitive contracts. Essentially the same language is found at FAR 52.229-3(h) (SOF ¶ 5). There is no evidence in the record before us to support the bare assertion in the letter that the contracting officer offered any guidance to RPI as to taxes (*see* SOF ¶ 1).

11. On 18 April 2001 RPI appealed directly to Major General Richard A. Cody by letter requesting he designate RPI an agent of the federal government to preclude the State of Tennessee from collecting the taxes it sought from RPI. In its letter RPI estimated the taxes could increase its cost by "as much as half a million dollars" and that RPI would "necessarily seek recovery from the Government for the balance of this amount as an unanticipated cost under the contract." (App. supp. R4, tab 512)

12. On 2 May 2001, the government responded that Major General Cody did not have authority to make such a designation, citing FAR 29.303 (R4, tab 9). The cited FAR clause states:

> (a) Prime contractors and subcontractors shall not normally be designated as agents of the Government for the purpose of claiming immunity from State or local sales or use taxes. Before any activity contends that a contractor is an agent of the Government, the matter shall be referred to the agency head for review.…
>
> ….
>
> (c) Frequently, property…owned by the Government is in the possession of a contractor or subcontractor.

> Situations may arise in which States or localities assert the right to tax Government property directly or to tax the contractor's or subcontractor's possession of, interest in, or use of that property.…

The letter also informed RPI that "[t]he Department of the Army strictly construes the FAR term 'not normally' and, absent Congressional action, will not designate contractors as agents of the Army" (R4, tab 9).

13. On 30 June 2001 the State of Tennessee issued a Notice of Assessment to RPI for sales and use taxes for the period 1 December 1994 through 28 February 2001 in the amount of $518,377.00, plus $51,837.00 penalty and $303,675.26 interest, for a total of $873,889.26. RPI was also assessed amounts for business and franchise/excise taxes. (App. supp. R4, tab 509 at 3)

14. The State of Tennessee audit workpapers placed in the record by RPI provide the following "Specific explanation of Use Tax discrepancies and audit procedures" as they related to RPI:

> Taxpayer is an independent contractor for laundry and dry cleaning services at Ft. Campbell, KY. In accordance with Army Regulation 210-130, this facility is a government-owned, contractor-operated (GOCO) facility. This regulation states "the contractor will repair and maintain installed laundry and dry cleaning equipment. …the cost of operation supplies will be borne by the contractor." Ft. Campbell provides the building and equipment to be used in the performance of the contract for these services. Tax has never been paid previously on the issued equipment. In accordance with 67-6-102 and 67-6-201(2) a tax is imposed upon the privilege of use by a contractor of tangible personal property, regardless of title where such property has not previously borne a sales or use tax. (*United States v. Boyd*, 211 Tenn. 139, 363 S.W.2d 193 (1962)).
>
> Taxpayer also uses gas, electricity, compressed air, and water at the facility for use in the performance of the contract. The utilities, all of which fall within the definition of tangible personal property, are provided to the contractor by Ft. Campbell army base exempt of tax. Taxpayer is responsible to remit use tax in accordance with existing statutes 67-6-102, 67-6-201, and 67-6-209(b). Expenses were examined using a

> block sample. Taxpayer had some items of tangible personal property, which were imported or caused to be imported into the state of Tennessee by the taxpayer, that had not been taxed. Rule 1320-5-1-63[.] These discrepancies have been scheduled. Other items of property, purchased from two vendors registered in the state of Tennessee, had Kentucky tax charged on their invoices, because the location address had "Ft. Campbell, KY 42223" as the mailing address. These vendors have been notified of the discrepancies and have taken steps to correct their errors and apply for a credit from the Kentucky Department of Revenue to be remitted to the state of Tennessee.

(App. supp. R4, tab 509 at A-4) RPI's objections to the assessment were also recorded in the audit workpapers:

> Taxpayer takes exception to having to charge sales tax on over the counter sales to patrons of the Ft. Campbell laundry facility. Additionally, taxpayer is not in agreement with having to pay use tax on tangible personal property, provided to them by the U.S. Army, in order to perform their laundry service. Also, taxpayer takes exception to having to pay use tax on utilities used in the performance of their contract. Taxpayer takes exception to having to file business tax with the city and county, because the taxpayer is of the opinion that he is acting as an agent for the government. (See attached "Response to Auditor's Findings" Memorandum from Don Waggoner, CPA)

(App. supp. R4, tab 509 at A-8)

15. On 13 December 2001 RPI participated in an "informal conference" with the Tennessee Department of Revenue for the purpose of appealing the assessment of "all tax, interest and penalty associated with the contract between RPI and the Army." RPI was represented at the conference by counsel hired for that purpose and RPI's CPA. (App. supp. R4, tab 513 at 1-2) RPI's primary argument was that it was an agent of the government and therefore not subject to the taxes assessed (app. supp. R4, tab 513 at 2-9). The conference was continued so RPI could provide a complete copy of Contract No. DAKF40-97-C-0499 which was done by 11 January 2002 (app. supp. R4, tab 514 at 1 n.1)

16. On 1 August 2002 RPI requested a contract price increase due to the assessment of alleged after-imposed Tennessee state sales and use taxes. On 14 August 2002 the CO denied RPI's request:

> The request for the price increase is denied as there is no authority to grant a contract increase for an after-imposed state or local tax. FAR 52.229-3 (Federal, State, and Local Taxes) was, in fact, included in your contract, but that clause provides for reimbursement for after-imposed *federal* taxes only; there is no provision in that clause for providing adjustments as requested for after-imposed state or local taxes. [emphasis in original]

(R4, tab 6)

17. On 30 September 2002 the Tennessee Department of Revenue responded to the arguments made by RPI in the 13 December 2001 informal conference (SOF ¶ 15).

> The use tax established by [Tenn. Code Ann. § 67-6-209(b)] "prevents private independent contractors from escaping the privilege tax merely because the property used in this private capacity was immune from such tax when purchased." *United States v. Boyd*, 363 S.W.2d 193, 203 (Tenn. 1962). Thus, if no exemption applies, the tangible personal property used by the Taxpayer in fulfillment of its contract is subject to use tax.
>
> According to the Taxpayer, an exemption does apply. Because the Taxpayer argues that it is acting as an agent of the government, it contends that it qualifies for the exemption set forth at Tenn. Code Ann. § 67-6-308.…
>
> > [N]o sales or use tax shall be payable on account of any direct sale or lease of tangible personal property or services to the United States … for consumption or use directly by it through its own government employees.
>
> According to the Taxpayer, the issue is whether it was acting as an agent or as an independent contractor. If the Taxpayer was acting as an agent of the government, the Taxpayer contends that its use of the government equipment is exempt from tax pursuant to Tenn. Code Ann. § 67-6-308.

(App. supp. R4, tab 514 at 2) After analyzing the information provided by RPI, the Tennessee Department of Revenue concluded:

> Based upon the contract, the applicable regulations, and the facts presented, the federal government does not exercise any more control over the Taxpayer than it does any independent federal contractor. Ultimately it is the Taxpayer that determines in plant workflow. It is the Taxpayer who hires, fires, and manages laundry employees, and it is the Taxpayer who provides the laundry service and who determines the rate to charge for individual piece work. Thus, the Taxpayer is not an agent of the federal government, and the equipment and utilities at issue are not used directly by the government or government employees. Thus, use tax was properly assessed.

(App. supp. R4, tab 514 at 3)

18. On or about 27 February 2006 RPI and the State of Tennessee reached a settlement in which Tennessee waived all penalties and reduced the assessed amount of taxes (app. mot., ex. 5). On 13 June 2006 RPI paid by cashier's check the State of Tennessee tax assessment in the amount of $659,257.71 (R4, tab 10 at 3). The amount paid by RPI included $360,064.34 in sales and use taxes, franchise/excise tax and business tax, plus interest through 28 February 2006 in the amount of $299,193.37 (app. mot., ex. 5).

19. On 17 July 2006 RPI submitted its certified claim to the CO in the amount of $659,257.71, citing three alternative theories: (i) misrepresentation; (ii) mutual mistake; and, (iii) that RPI was a government agent (R4, tab 10). The contracting officer did not respond to RPI's claim and on 5 October 2006 RPI appealed to this Board from a deemed denial of its claim.

20. RPI currently operates the laundry facility at Fort Campbell under Contract No. DABK09-03-C-0007 (R4, tab 10; app. opp'n at 5). That contract contains ¶ 5.21.2 which states: "The contractor shall post individual piece rate price list to reflect Government assessed overhead expenses state taxes and distribute to all units/customers" (app. opp'n, ex. 6). This paragraph was not in the two previous contracts (*see* R4, tab 1; app. supp. R4, tab 500).

DECISION

Appellant's Motion for Declaratory Relief (Statute of Limitations)

The subject of RPI's motion for declaratory relief is the government affirmative defense, raised in pleadings, that RPI's claim is time-barred. The Contract Disputes Act (CDA), 41 U.S.C.A. § 605(a), requires that claims "shall be submitted within 6 years after the accrual of the claim." The six-year statute of limitations is jurisdictional. *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378.

FAR 33.206 expressly provides that the "6-year time period does not apply to contracts awarded prior to October 1, 1995." The earlier Contract No. DAKF23-94-C-0008, as to which RPI was assessed Tennessee taxes and submitted a claim to the government, was awarded with an effective date of 23 October 1993 (SOF ¶ 2). The six-year statute of limitations, therefore, does not apply to that contract and the amount of RPI's claim arising under Contract No. DAKF23-94-C-0008 is not time-barred.

The second contract as to which RPI was assessed Tennessee taxes and submitted a claim to the government was awarded with an effective date of 1 October 1997 (SOF ¶ 5). Under FAR 33.206 RPI's claim arising under that contract must have been submitted within six years of accrual of the claim. FAR 33.201, DEFINITIONS, provides:

> *Accrual of a claim* means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

Here, as in *Gray Personnel*, *supra*, 06-2 BCA at 165,476, the appellant has claimed monetary damages. Accordingly, we must look to when RPI incurred extra costs for liability to be fixed. *Id*. RPI argues that its liability was fixed when it reached agreement with the State of Tennessee on 27 February 2006 (app. mot. at 4; SOF ¶ 18). Whether we agree with RPI or we find that liability was fixed when RPI wrote a check to the State of Tennessee on 13 June 2006 and thereby actually incurred increased costs (SOF ¶ 18) is immaterial. Both dates are well within the six-year period prior to RPI's submission of its certified claim on 17 July 2006 (SOF ¶ 19). RPI's claim arising under Contract No. DAKF40-97-C-0499 is not time barred.

For the reasons discussed above, we grant RPI's motion for declaratory relief.

Government Motion for Summary Judgment (Tax Liability)

We evaluate the government's motion for summary judgment under the well-settled standard that:

> Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law…. The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

Mingus Consructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In the course of our evaluation, the Board's role is not "'to weigh the evidence and determine the truth of the matter, but rather to ascertain whether material facts are disputed and whether there exists any genuine issue for trial.'" *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849 at 157,393 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)), *aff'd*, 57 Fed. Appx. 870 (Fed. Cir. 2003). A material fact is one which may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The non-moving party must then set forth specific facts showing the existence of a genuine issue of material fact for trial; conclusory statements and bare assertions are insufficient. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

> Although the onus is on the moving party to persuade us that it is entitled to summary judgment, the movant may obtain summary judgment, 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. *E.g.*, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986). Summary judgment is appropriate in that situation, even though some factual issues may remain unresolved, because "a complete failure of proof concerning an essential element of a nonmoving party's case necessarily renders all other facts

immaterial." *Id.*, 477 U.S. at 323.

Holmes & Narver, supra, 02-1 BCA at 157,392, *aff'd*, 57 Fed. Appx. 870 (Fed. Cir. 2003).

In its certified claim RPI has asserted two bases upon which it relies to support its allegation that it is entitled to be reimbursed by the government for the Tennessee state sales and use taxes assessed against RPI during its performance of the second contract: (1) the government misrepresented the applicability of the tax to RPI; and (2) mutual mistake of fact. Also contained in its claim to the contracting officer is RPI's allegation that the government failed to meet its obligation under FAR 52.229-3(h) when it declined to designate RPI an agent of the government for the purpose of procuring an exemption from the Tennessee state use tax. (R4, tab 10) As RPI ultimately bears the burden of proving its allegations against the Army, the government is entitled to summary judgment if we conclude that RPI cannot establish one or more crucial aspects of each of its theories.

1. Misrepresentation

RPI argues that the government misrepresented the liability for Tennessee state taxes when it failed to inform potential bidders, including RPI, of the existence of the tax. RPI further argues that the government's failure to specifically ask RPI in the bid verification request (SOF ¶¶ 1, 3) whether state taxes were included was an act of omission amounting to a misrepresentation.

In order to prevail on a claim of misrepresentation, RPI must prove: (1) an erroneous representation of material fact by the government; and (2) reasonable reliance by the contractor. *Holmes & Narver, supra*, 02-1 BCA at 157,395; *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 728 (Fed. Cir. 1997). If RPI does not produce evidence to support both of these elements, its claim is "fatally flawed" and cannot survive summary judgment.

All the contracts performed by RPI incorporated by reference FAR 52.229-3, FEDERAL, STATE, AND LOCAL TAXES (SOF ¶¶ 1, 5). It is well-established that 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, 1372-3 (Fed. Cir. 2002). "[A] bidder must include the amount of a tax in its bid or assume the risk of paying it without reimbursement since the duty of determining tax applicability is on the bidder." *Gibson Motor & Machine Service, Inc.*, ASBCA No. 24363, 80-1 BCA ¶ 14,442 at 71,202. In order to fulfill this responsibility, it is incumbent upon potential bidders to conduct sufficient investigation to ascertain the existence or nonexistence of such taxes since they are charged with knowledge of all

applicable laws and regulations. *GarCom, Inc.*, ASBCA No. 55034, 06-1 BCA ¶ 33,146. RPI admittedly "assumed" there were no such taxes applicable to it (SOF ¶ 10), and it has offered no evidence it conducted any sort of investigation to reasonably justify this assumption.

RPI makes the argument that the Tennessee taxes were "not an 'applicable tax'" under FAR 52.229-3 because Tennessee never assessed taxes against RPI (app. opp'n at 13), apparently believing that a tax is only applicable if the state initiates contact rather than the business owner investigating state statutes and filing tax returns in the absence of state contact. It further contends that the State of Tennessee waiver of penalties, without waiver of the taxes themselves or the interest charged, is consistent with the inapplicability of the taxes. We find these arguments circular and unpersuasive.

If the government makes a representation regarding taxes, it is held responsible for the accuracy of that representation. However, where, as here, the government makes no representation about taxes at all, it cannot have made a misrepresentation. *Holmes & Narver, supra*, 02-1 BCA at 157,395.

We find it undisputed on this record that the government made no representations whatsoever about taxes (federal, state or local) to RPI or any other potential bidder (SOF ¶¶ 1, 3, 10). We further find, as a matter of law, that the government had no legal or contractual duty to ask RPI specifically if it had included taxes in its bid. *Hunt Construction Corp., supra*, 281 F.3d at 1376. Having found it undisputed that the government made no misrepresentation to RPI, we must also find it undisputed that RPI could not have relied to its detriment on a misrepresentation never made.

RPI makes the further argument in support of its misrepresentation claim that inclusion of ¶ 5.21.2 in its 2003 contract (SOF ¶ 20) confirms its reasonable assumption that state taxes were not applicable to its previous contracts and presents a reasonable inference that such language should have been included in the prior contracts (app. opp'n at 12; R4, tab 10 at 2). We are not persuaded. The language in question does nothing more than require RPI to include all its expenses, including state taxes, if any, in its piece rate price list. The sentence does not indicate to RPI that it does, or does not, have a state tax liability, leaving it up to RPI to investigate its liability for state taxes.

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

2. Mutual Mistake of Fact

To be granted reformation on the basis of a mutual mistake of fact, a party must prove that: (1) the parties to a contract were mistaken in their belief regarding an existing fact; (2) the mistake constitutes 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 the mistake on the party alleging mistake. *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); *The Boeing Company*, ASBCA No. 52256, 02-1 BCA ¶ 31,811 at 157,214.

"The purpose and function of the reformation of a contract is to make it reflect the true agreement of the parties on which there was a meeting of the minds." *Twigg Corp.*, ASBCA No. 48605, 96-2 BCA ¶ 28,423 at 141,973. To establish a mutual mistake warranting reformation, RPI must first show that both parties to the contract were mistaken in their belief regarding an existing fact.

RPI offers evidence that it had "never before" been assessed taxes by the State of Tennessee "through many years of performance on this contract and prior, similar contracts" (app. mot. at 8). RPI further argues that it was reasonable in believing that the State of Tennessee would never assess taxes against it. On the record before us, it was an existing fact at contract award that RPI had not ever paid Tennessee sales and use taxes (SOF ¶ 1). RPI's "understanding and expectation" (app. opp'n at 1) that it would never pay Tennessee sales and use taxes in the future after contract award, the "mistake" it argues forms the basis for reformation (app. opp'n at 7), is not a mistake as to an existing fact at the time of contract award:

> "A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined [under the doctrine of mutual mistake of fact]." Restatement (Second) of Contracts § 151 cmt. a (1981);…*United States v. Garland*, 122 F.2d 118, 122 (4th Cir.) ("A mutual mistake in prophecy or opinion may not be taken as a ground for rescission where such mistake becomes evident through the passage of time.")…. Indeed, there is uniformity among the circuit courts of appeals and the commentators that mutual mistake of fact cannot lie against a future event.

Dairyland Power Cooperative, *supra*, 16 F.3d at 1203. RPI's mistaken belief about whether the State of Tennessee would require it to pay taxes at some point in the future after contract award cannot form the basis for a mutual mistake of fact. It is therefore immaterial whether RPI's belief about likelihood of future taxes was reasonable or not

and we need not address those arguments. We also need not address RPI's arguments as to the government's belief about future taxes.

Drawing all inferences in favor of RPI, it has failed to offer evidence in response to the government motion for summary judgment that would meet its burden of proving the first element of mutual mistake of fact. Absent proof of a mutual mistake regarding an existing fact, elements two and three cannot be sustained. *Alfair Development Co.*, ASBCA Nos. 53119, 53120**,** 05-2 BCA ¶ 32,990 at 163,514*, aff'd,* 208 Fed. Appx. 840 (Fed. Cir. 2006).

As to the fourth element of mutual mistake, we stated previously in this decision that it is well-established that FAR 52.229-3, FEDERAL, STATE, AND LOCAL TAXES, places responsibility squarely on the potential bidder to do its due diligence by investigating whether any federal, state and local taxes are applicable. *Hunt Construction Corp., supra,* 281 F.3d at 1372-73. The record is barren of any evidence that RPI performed any investigation of its tax liabilities in the State of Tennessee; rather, it "assumed" (SOF ¶ 10) it had no such liabilities.

The tax clause included in RPI's contract provided a definition and a remedy for after-imposed federal taxes (SOF ¶ 6). It did not provide a remedy for after-imposed state taxes which RPI argues are at issue here. RPI argues that:

> there was an administrative action taking effect after the 1997 Contract date of award, effected by the Tennessee Department of Revenue, which decided to, for the first time, impose sales and use taxes upon a federal contractor performing laundry services on a U.S. military base partially located in Tennessee. Such an administrative action resulting in a federal tax upon a contractor would fall squarely within the definition of an "after-imposed Federal tax" and there is no reason, in logic or at law, why the same rationale would not apply to an administrative action at the state level, similarly resulting in the imposition of an after-imposed State tax upon a federal contractor. See FAR 52.229-3(a)….

(App. opp'n at 9) RPI's argument raises two issues: (1) that an administrative action by the Tennessee Department of Revenue took place after contract award; and, (2) that the lack of a remedy in FAR 52.229-3 for an after-imposed state tax is illogical.

RPI's argument that there was an administrative action by the Tennessee Department of Revenue which took place after contract award, raised for the first time in its motion in opposition, is a bare assertion unsupported in the record. RPI neither cites

to nor offers any evidence in support of its argument that by its notice of audit on 20 February 2001 the State of Tennessee made the administrative decision to single out RPI for payment of sales and use taxes to the exclusion of all other similarly situated businesses. (App. opp'n at 9) While not citing to them in support of this argument, RPI has offered into the record for purposes of the motions the statements of two government contractors who have bid on contracts at Fort Campbell, but there is no evidence that either of them has actually performed a contract at Fort Campbell or anywhere in Tennessee (app. opp'n, ex. 11). Their statements of never having paid Tennessee taxes are, therefore, irrelevant to the issue before us.

The second issue argued by RPI as to alleged after-imposed state taxes is not new. We have consistently held that, absent a special adjustment clause or statutory relief, FAR 52.229-3 grants a remedy for after-imposed federal taxes, not state or local taxes. *Professional Services Unified*, ASBCA No. 48883, 96-1 BCA ¶ 28,073; *R. B. Hazard*, ASBCA No. 35752, 88-3 BCA ¶ 20,873. Even if we were to entertain RPI's argument that a remedy such as the one in FAR 52.229-4 for after-imposed state taxes should have existed for it, RPI's argument would still be unfounded. An after-imposed state tax is defined in FAR 52.229-4 (JAN 1991) as:

> any new or increased…, State,…tax or duty, or tax that was excluded on the contract date but whose exclusion was later revoked or amount of exemption reduced during the contract period, other than an excepted tax, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.

The Tennessee sales and use taxes were not new taxes. There is uncontroverted evidence that sales and use taxes had been established in Tennessee since 1947 (SOF ¶ 8). Nor is there any evidence that the sales and use taxes were increased after contract award. There is no evidence that the State of Tennessee had exempted RPI from paying the taxes as of contract award and then that exemption was subsequently revoked. The fact that RPI's nonpayment of taxes had somehow escaped detection by the State of Tennessee until 2001 could hardly be characterized as the grant of an exemption or exclusion referred to in FAR 52.229-4. For all these reasons, we reject RPI's argument that the sales and use taxes at issue were compensable after-imposed taxes.

We hold that, on the record before us in support of the motions, there are no disputed material facts and the undisputed facts fail to support RPI's theory of mutual mistake of fact. The government is, therefore, entitled to judgment in its favor as a matter of law.

3. Alleged Agency Relationship

RPI claims it had an "agency relationship" with the government under the laundry facility contract which would have entitled it to an exemption from the State of Tennessee state sales and use taxes (app. supp. R4, tab 509 at A10-11). RPI argues "[t]he Army could have provided Appellant and the Department [of Revenue] this evidence [of an agency relationship] but did not" (app. opp'n at 15). RPI's argument ignores that, on its face, FAR 52.229-3(h) does not require the government to provide support for an exemption unless there is "a reasonable basis…to sustain the exemption" and, even if support for an exemption is provided, the government does so "without liability" (SOF ¶ 6).

RPI argued vociferously over many months to the State of Tennessee that it was an agent of the government and, therefore, an exemption was appropriate. Based on documents submitted by RPI, the record shows the State of Tennessee found no evidence of an agency relationship, instead finding a typical contractor relationship (SOF ¶ 17). RPI now argues that the government breached its contractual obligation under 52.229-3(h) by not agreeing to designate RPI an agent for the purpose of avoiding the State of Tennessee taxes. However, in *Hunt*, 281 F.3d at 1372, the Court of Appeals for the Federal Circuit held that, particularly when read together with FAR 29.303(a) (SOF ¶ 12), the government is not obligated to execute such agency agreements.

We find that, as a matter of law, RPI was not entitled to the agency designation it sought in order to avoid State of Tennessee taxes.

CONCLUSION

RPI's motion for declaratory relief is granted as we find its claim is not time-barred. The government's motion for summary judgment is granted. The appeal is therefore denied.

Dated: 25 July 2008

DIANA S. DICKINSON
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55622, Appeal of Robertson & Penn, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals