ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
UniTech Services Group, Inc.	)	ASBCA No. 56482
	)	
Under Contract Nos. N00604-99-M-1600	)	
N00604-99-M-1602	)	
N00604-99-C-1608	)	
N00604-03-P-A549 and	)	
Predecessor Contracts	)	

APPEARANCE FOR THE APPELLANT:	John C. Person, Esq. Person & Craver LLP Washington, DC
APPEARANCES FOR THE GOVERNMENT:	Thomas N. Ledvina, Esq. Navy Chief Trial Attorney Richard A. Gallivan, Esq. Stephen R. O'Neil, Esq. Assistant Directors

OPINION BY ADMINISTRATIVE JUDGE THOMAS ON
THE GOVERNMENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Pearl Harbor Naval Shipyard (PHNSY or Shipyard) serves as a home port for a fleet of nuclear submarines. Shipyard personnel are sometimes required to wear protective clothing against exposure to radioactive material. From approximately 1971 until 2006, appellant UniTech Services Group, Inc. (UniTech) provided laundry services for the protective clothing (sometimes "nuclear laundry" or "nuclear decontamination" laundry). In 2006, upon the expiration of Contract No. N00604-03-P-A549 (Contract A549), the last of a series of contracts, the Shipyard switched to onetime use, disposable protective clothing, effectively putting UniTech out of business at the Shipyard. UniTech subsequently incurred costs for shutting down its nuclear laundry facility. It seeks to recover those costs plus lost profits in this appeal.

Appellant's complaint sets forth three alternative bases of recovery. In count I, it alleges that the government has breached an enforceable implied-in-fact "requirements" contract for long-term nuclear laundry services. It claims core damages of $708,100 plus lost profits of $450,000. In count II, it alleges that there was a constructive termination for convenience of the implied-in-fact contract. It claims the core damages of $708,100 plus $50,000 in settlement costs. In count III, it alleges a right to equitable recoupment. It claims only the core damages of $708,100. In its answer, the government denies that there was an implied-in-fact requirements contract. It alleges that Contract A549 was

closed out as of 22 March 2007 and a contractor's release signed, and that all predecessor contracts had been completed (answer ¶ 3). It denies any right to equitable recoupment.

The government has moved for judgment on the pleadings. It asserts that the motion may be resolved by looking to the complaint and the law only. Appellant opposes the motion. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. In approximately 1971, the Shipyard issued a Request for Proposals (RFP) for the provision of nuclear laundry services. The RFP required that the successful offeror locate a processing facility on the Island of Oahu, obtain a federal license to perform the nuclear decontamination work, and provide a dedicated vehicle for providing the laundry services. (Compl. ¶ 10)

2. UniTech, then known as Interstate Nuclear Services, Inc., satisfied the requirements of the RFP including establishing a processing facility, which is referred to as Location 151 (compl. ¶¶ 11, 12).

3. The Shipyard accepted UniTech's proposal, and awarded it the first of a series of consecutive five-year contracts, with the first three years being the base period, and with the fourth and fifth years being option years. In the 1990's the Shipyard shortened the overall contract period to three years, with the first year being the base period and years two and three being the option years. (Compl. ¶ 14)

4. Each of these contracts provided for unit pricing and a minimum monthly charge. The contract included unit pricing for discrete quantities of five items of protective clothing: coveralls, hoods, rubber gloves, rubber shoe covers, and arm sleeves. The quantities associated with these items were based on the Shipyard's estimate of its protective clothing needs for that period. UniTech's estimate of the monthly fixed costs became the minimum monthly charge. (Compl. ¶¶ 16, 30)

5. As the Shipyard knew, the pricing proposals for the contracts made no provision or allowance for "stranded costs and post-termination costs that were continuing in nature" (compl. ¶ 22).

6. The parties sometimes disregarded contracting formalities. For example, the Shipyard frequently exercised the option periods outside of the exercise window as specified in the contract. In addition, toward the latter part of the last year of an existing contract, the Shipyard would advise UniTech of upcoming busy periods that were scheduled to take place during the first year of performance of the follow-on contract. (Compl. ¶¶ 19, 20)

7. The final contract in the series of contracts was Contract A549 which came to an end in March 2006, at the conclusion of the second option year (compl. ¶ 21).

8. Prior to the conclusion of Contract A549, at the Shipyard's request, UniTech had prepared and submitted a proposal for the upcoming three-year period. While its proposal was under review, the Shipyard informed UniTech that funding for nuclear laundry services had been withdrawn. (Compl. ¶ 21)

9. UniTech was not told when bidding that Contract A549 would be its last contract and, therefore, had no opportunity to capture its continuing post-contract costs as charges during any of the three years associated with that contract (compl. ¶ 22).

10. The Shipyard still has requirements for protective clothing. Instead of decontaminating and reusing protective clothing as it had done before, the Shipyard's present practice is to requisition new protective clothing, have the garments worn once, and dispose of them as low-level nuclear waste in a licensed landfill. (Compl. ¶ 25)

11. There were and are no generators of contaminated protective clothing in Hawaii other than the Shipyard. After approximately 18 months of trying to reestablish the relationship with the Shipyard, UniTech made the decision to close the Honolulu facility. (Compl. ¶¶ 12, 24)

12. There is substantial cost and effort involved in closing a nuclear laundry facility. Generally, UniTech seeks recovery in this appeal of its Nuclear Regulatory Commission (NRC) licensing fee for the period from completion of the 2003 contract to the completion of decommissioning the facility (2 years), nuclear insurance for an estimated 50 years beyond the closure of the facility, the salary of the Radiation Safety Officer (RSO) (2 years), the unamortized portion of its total decommissioning cost for the facility (15 years), unabsorbed rent (2 years), and miscellaneous costs. For amortization purposes UniTech assumes the entire useful life of Location 151 was 50 years, that revenue was received for 35 years (1971-2006), and that 15 years remained as of 2006. These various amounts total $708,100. (Compl. ¶¶ 39-46)

13. On 19 February 2008, UniTech submitted its certified claim to the contracting officer. On 1 July 2008, the contracting officer denied the claim. (Compl. ¶ 26)

14. On 22 July 2008, UniTech filed its notice of appeal with the Board and the appeal was docketed as ASBCA No. 56482 (compl. ¶ 27).

ALLEGATIONS IN THE COMPLAINT

UniTech summarizes the nature of its action in the following paragraphs of the complaint:

> 4. UniTech brings this action to recover the additional costs it incurred in the performance of nuclear decontamination of protective clothing for the Pearl Harbor Naval Shipyard (PHNSY or Shipyard).
>
> 5. The basis for this claim is that there developed over a period of approximately 35 years an exclusive, mutually dependent relationship between UniTech and PHNSY and that this relationship, along with UniTech's justifiable reliance on the continuation of this relationship, induced UniTech to incur costs for which it is entitled to recover.
>
> 6. The parties' conduct over some 35 years of uninterrupted performance gave rise to an implied-in-fact contract. PHNSY's abrupt departure from laundering contaminated nuclear clothing in accordance with that implied-in-fact contract to the practice of one-time use and disposal constitutes conduct that is inconsistent with the Shipyard's obligations to UniTech.
>
> 7. PHNSY's conduct is actionable as: (a) a breach of a requirements contract; (b) a claim in response to a constructive termination for convenience; and (c) a claim under the equitable recoupment doctrine. The costs for which UniTech is entitled to recover include at least the following:
>
> - NRC Licensing Fee: $54,800
> - Nuclear Insurance: 187,000
> - RSO Salary 180,000
> - Decommissioning Cost 128,700
> - Unabsorbed Rent: 117,600
> - Miscellaneous Fixed Costs: 40,000
>
> $708,100
>
> 8. To the extent that the Shipyard's action is deemed to be a breach of a requirements contract, then UniTech is entitled to recover an additional amount of at least $450,000 as lost profits on the wrongfully diverted work. Alternatively, if PHNSY's action is deemed to be a constructive termination

> for convenience, then UniTech is entitled to its claim preparation costs, which are estimated to be at least $50,000.

The complaint generally refers to the implied-in-fact contract as an "overarching agreement" or "overarching understanding" (*see, e.g.*, compl. ¶¶ 20, 34, 35). In Count I, the complaint describes the contract as follows:

> 32. The understanding implicit in UniTech's commitment to providing the capital and the other investment necessary to provide nuclear laundry service to the Shipyard was that UniTech would provide all such servicing as long as PHNSY had protective clothing requirements. The parties had been in a long-term, exclusive, mutually dependent relationship. UniTech serviced all of PHNSY's contaminated nuclear laundry, and UniTech's Location 151 had no customer other than PHNSY. The Shipyard knew at all relevant times that the economic viability of Location 151 utterly depended on the continued servicing of PHNSY's nuclear laundry needs.
>
> 33. Additionally, the parties treated the successive short-term contracts merely as a means of updating the pricing for the real bargain struck by the parties: that UniTech was the exclusive provider of nuclear laundry services as long as PHNSY had protective clothing needs. This real understanding is evidenced by the parties' disregard of contracting formalities, such as by discussing nuclear laundry needs for timeframes beyond the existing contract term and by the Shipyard's lax attention to the option notice requirements.
>
> 34. UniTech relied to its detriment on the continuation of this overarching understanding by not including regulatory costs and unabsorbed and stranded costs into its monthly and/or unit pricing….
>
> ….
>
> 36. All the makings of an overarching implied-in-fact requirements contract are present in this case. PHNSY offered UniTech an exclusive, long-term business opportunity to service all of its nuclear laundry needs, as long as the Shipyard had those needs and UniTech continuously provided competent service. UniTech accepted that offer by building

> the facility, obtaining the NRC license, and by sharing the Shipyard's vision for an exclusive, mutually dependent relationship with one another. The consideration for the agreement is that UniTech detrimentally relied on its reasonable assumption that the Shipyard would uphold its end of the bargain. This reliance, in turn, is evidenced by UniTech's pricing, fully known to PHNSY, which excluded regulatory costs and unabsorbed and stranded costs.
>
> 37. The parties' tacit understanding gave rise to a valid and enforceable implied-in-fact contract. The exclusive and mutually dependent nature of this implied-in-fact contract also means that this overarching agreement was a "requirements" contract, as well. The short-term contracts that were executed by the parties during the course of the 35-year relationship were merely ordering documents that provided the ministerial means for paying UniTech for its work.
>
> 38. The Shipyard's wholesale departure from its past practices concerning the use of protective equipment constitutes a breach of that "requirements" contract.

In Count II, the complaint alleges that the Shipyard's action in preventing UniTech from continuing performance constituted a constructive termination for convenience. Further, that the special termination cost principles set out in the FAR provide the authority to enable UniTech to recover its costs arising from the termination. (Compl. ¶¶ 51, 52)

In Count III, the complaint explains:

> 58. As a result of PHNSY's conduct described above, UniTech is entitled to recover under the equitable recoupment doctrine. That doctrine enables a party that has made investments pursuant to an exclusive franchise arrangement to recoup its expenditures if the franchisor terminates the arrangement, whether or not the terms of the arrangement were memorialized in a writing.

THE PARTIES' ARGUMENTS

The government moves for judgment on the pleadings upon the ground that the appeal must be denied as a matter of law. It argues that "[t]he Complaint reveals four separate, independent reasons that justify granting the motion" (memo at 1). The four reasons are: (1) failure to allege action by a government person with actual authority; (2) the presence of another related contract with the same subject matter; (3) a lack of consideration in the alleged implied-in-fact contract; and, (4) preclusion of a meeting of the minds that would violate the Anti-Deficiency Act (ADA), 31 U.S.C. § 1341. With respect to the ADA, it says that "[b]ecause no Contracting Officer could have authority under the ADA to enter into an open-ended agreement, there could be no mutual intent to contract, a prerequisite for an implied-in-fact contract" (*id.* at 12).

Appellant opposes the motion, contending that the burden that the government bears in successfully moving for judgment on the pleadings is a heavy one. With respect to actual authority, appellant states that it alleges that the government was bound by the acts of an agent with authority, and that the allegation was implicit in the facts alleged in the complaint (opp'n at 6). With respect to the presence of another related contract on the same subject matter, appellant "alleges that the successively executed, shorter-term express contracts gave rise to an overarching implied-in-fact contract, rendering the Government's argument fully distinguishable" (*id.* at 7). With respect to consideration, appellant states that the consideration for recovering its "stranded, continuing, and unamortized costs" was the "exclusive, mutually dependent relationship between Appellant and the Government…along with Appellant's justifiable reliance on the continuation of this relationship" (*id.* at 9). With respect to the ADA, appellant says that the "fundamental difference between the cases cited by the Government…and the instant case is that, here, the Government at all times knew or should have known of both the categories of costs that Appellant was incurring in as well as the amount of those costs" (*id*. at 10). Appellant concludes: "What is particularly galling here is that the Government is attempting to avoid by legal artifice payment for costs that were incurred solely for its benefit and costs that would be clearly payable had they been presented in other procedural settings" (*id.* at 15).

DECISION

Appellant seeks damages arising from the Shipyard's termination of a 35-year relationship during which appellant provided nuclear laundry services. The Shipyard simply allowed the last of a series of express contracts to expire. Appellant contends that, when the Shipyard did so, it breached "an overarching implied-in-fact requirements contract" (compl. ¶ 36). The government moves for judgment on the pleadings on four grounds: failure to plead actual authority, the presence of another contract with the same subject matter, lack of consideration, and preclusion of a meeting of the minds that would violate the ADA.

The Federal Rules of Civil Procedure, to which we look for guidance, provide in Rule 12(c) that after the pleadings are closed, a party may move for judgment on the pleadings. We apply the same standard to a motion for judgment on the pleadings as to one to dismiss for failure to state a claim pursuant to Rule 12(b)(6). In reviewing the motion:

> We must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff. [Citation omitted] To state a claim, the complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (2007). The factual allegations must be enough to raise a right to relief above the speculative level. *Id*. at 1965. This does not require the plaintiff to set out in detail the facts upon which the claim is based, but enough facts to state a claim to relief that is plausible on its face. *Id.* at 1974.

Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009).

The complaint here is sufficient to state a claim to relief that is "plausible on its face." Much remains to be fleshed out, but the Board's rules, like the Federal Rules of Civil Procedure, only require notice pleading. As stated in paragraph 36, the complaint alleges the elements of an implied-in-fact contract:

> PHNSY offered UniTech an exclusive, long-term business opportunity to service all of its nuclear laundry needs…. UniTech accepted that offer by building the facility, obtaining the NRC license, and by sharing the Shipyard's vision for an exclusive, mutually dependent relationship with one another. The consideration for the agreement is that UniTech detrimentally relied on its reasonable assumption that the Shipyard would uphold its end of the bargain. This reliance, in turn, is evidenced by UniTech's pricing, fully known to PHNSY, which excluded regulatory costs and unabsorbed and stranded costs.

With respect to the government's four grounds, we agree with appellant that the complaint implicitly alleges action by a government person with actual authority. Further, the complaint arguably distinguishes between the subject matter of the express contracts, nuclear laundry requirements for the current period, and that of the implied-in-fact contract, the Shipyard's long-term nuclear laundry needs and the facility necessary to provide them. The complaint clearly alleges consideration. Finally, we are not prepared to hold without development of the facts that there would be a violation of

the ADA as a matter of law. While the government may ultimately prevail on one or another of these grounds after hearing, it has not established that it is entitled to judgment on the pleadings.

Accordingly, we deny the government's motion for judgment on the pleadings.

Dated: 22 January 2010

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

I concur

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

I concur

PETER D. TING
Administrative Judge
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. 56482, Appeal of UniTech Services Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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