ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
AECOM Government Services, Inc.	)	ASBCA No. 56861
	)	
Under Contract No. W91GY0-08-D-0001	)	

APPEARANCES FOR THE APPELLANT:

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LTC Dana J. Chase, JA
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OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND
APPELLANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

AECOM Government Services, Inc. (AECOM) seeks an equitable adjustment of $2,051,551 for Federal Insurance Contributions Act (F.I.C.A.) taxes imposed on its wholly owned offshore subsidiary by The Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act or Act), 26 U.S.C.A § 3121z. The Act became law approximately six months after contract award. Prior to passage of the Act, offshore subsidiaries of United States corporations were not required to pay F.I.C.A. taxes for United States citizens working abroad. The government moves for summary judgment, alleging that there is no authority for increasing the contract price for "after-imposed" F.I.C.A. taxes and that AECOM bears the risk of increased costs under a firm fixed-price contract. AECOM's claim asserts two bases for recovery, the first of which is mutual mistake of fact. According to AECOM, the parties mistakenly believed at the time they entered into the contract that F.I.C.A. taxes would not apply. In its opposition to the government's motion for summary judgment and its cross-motion for partial summary judgment, AECOM states that its claim for mutual mistake is not appropriate for summary judgment as there are disputed issues of material fact. The government does not address mutual mistake in its response to appellant's

opposition and cross-motion other than in conclusory fashion. We conclude that the issue of mutual mistake is not before us on the motion. Relying on *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005), AECOM cross-moves for partial summary judgment on its second basis for recovery, asserting that the Act breached the government's implied warranty of the covenant of good faith and fair dealing. We grant the government's motion for summary judgment as to this issue and deny AECOM's motion for partial summary judgment.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. On 31 December 2007, the Joint Contracting Command—Iraq/Afghanistan (government) awarded Contract No. W91GY0-08-D-0001 to AECOM (R4, tab 1). The work required establishment of the initial operating capability and training of an Iraqi workforce to operate and manage the National Depot for the Iraqi Joint Forces at Taji, Iraq (R4, tab 1, SOW ¶ 2.0). The contract was an indefinite quantity contract with an initial ordering period of 1 January 2008 to 31 December 2009 and two six-month option periods (R4, tab 1 at 2). The work was performed by AECOM GSS, Ltd., a wholly owned offshore subsidiary of AECOM (R4, tab 2 at 2).

2. The only clause in the contract relating to taxes is FAR 52.229-6, TAXES-FOREIGN FIXED-PRICE CONTRACTS (JUNE 2003) (R4, tab 1). The clause defined an after-imposed tax as "any new or increased 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, other than excepted tax...." The definition specifically excepted social security or other employment taxes.

3. At award, offshore subsidiaries of United States corporations doing business with the federal government were not required to pay F.I.C.A. taxes. As a result, AECOM did not include F.I.C.A. taxes in its labor rate (R4, tab 3; mot. ¶ 3).

4. The purpose of the HEART Act was to provide tax relief for military personnel. The revenue provisions of the Act eliminated the F.I.C.A. tax exemption for offshore subsidiaries. Section 302 of the Act provided, in part, as follows:

> SEC. 302 CERTAIN DOMESTICALLY CONTROLLED FOREIGN PERSONS PERFORMING SERVICES UNDER CONTRACT WITH UNITED STATES GOVERNMENT TREATED AS AMERICAN EMPLOYERS.

(a) FICA TAXES. –Section 3121 [of the Internal Revenue Code of 1986] (relating to definitions) is amended by adding at the end the following new subsection:

"(z) TREATMENT OF CERTAIN FOREIGN PERSONS AS AMERICAN EMPLOYERS.—

"(1) IN GENERAL.—If any employee of a foreign person is performing services in connection with a contract between the United States Government (or any instrumentality thereof) and any member of any domestically controlled group of entities which includes such foreign person, such foreign person shall be treated for purposes of this chapter as an American employer with respect to such services performed by such employee.

"(2) DOMESTICALLY CONTROLLED GROUP OF ENTITIES.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'domestically controlled group of entities' means a controlled group of entities the common parent of which is a domestic corporation.

"(B) CONTROLLED GROUP OF ENTITIES.—The term 'controlled group of entities' means a controlled group of corporations as defined in section 1563(a)(1), except that-

"(i) 'more than 50 percent' shall be substituted for 'at least 80 percent' each place it appears [in the text].

5. The Congressional Record for 20 and 22 May 2008 contain the following comments regarding the HEART Act:

[Sen. Baucus (D-MT)]: This bill is paid for by requiring that companies that do business with the Federal Government pay their employment taxes. The bill makes sure that foreign subsidiaries of U.S. parent companies that have contracts with the Federal Government pay employment taxes for their employees. 154 CONG. REC. S4773 (daily ed. May 22, 2008).

[Sen. Grassley (R-IA)]: The bill also ensures that U.S. employers of Americans working abroad pursuant to a Government contract pay Social Security and Medicare taxes, regardless of whether they operate through a foreign subsidiary. *Id*.

> [Sen. Kerry (D-MA)]: Recently, Representatives ELLSWORTH and EMANUEL and Senator OBAMA and I introduced the Fair Share Act of 2008 which ends the practice of U.S. government contractors setting up shell companies in foreign jurisdictions to avoid payroll taxes. I think that is appropriate that the Fair Share Act is included in the HEART Act. The revenue raised from closing this abusive loophole will help offset the tax relief provided to military families. *Id.* at S4774.
>
> [Rep. McCollum (D-MN)]: The Heart Act is fully offset and will not increase our national debt. It pays for these tax breaks by closing an offshore loophole that allows government contractors, who receive millions or billions in taxpayers' dollars, to set up companies in foreign countries to avoid paying Social Security and Medicare taxes. For example, defense contractor [Kellogg, Brown, and Root] has reportedly avoided paying over $100 million in Social Security and Medicare taxes by creating shell companies in the Cayman Islands. 154 CONG. REC. E1077-78 (daily ed. May 20, 2008).

6. AECOM began paying F.I.C.A. taxes on 1 August 2008, the effective date of the Act (R4, tab 7 at 1).

7. On 28 January 2009, AECOM requested an equitable adjustment of $1,546,083 for F.I.C.A. taxes paid through 31 December 2009 (R4, tab 3 at 1).

8. On 26 February 2009, the Contracting Officer (CO) denied AECOM's request, stating that FAR 52.229-6 excepted F.I.C.A. taxes from the definition of after-imposed taxes (R4, tab 4).

9. AECOM renewed its request for an equitable adjustment on 10 March 2009 (R4, tab 5). The CO denied the request on 28 March 2009, stating that neither the contract nor the FAR contained any provision authorizing an equitable adjustment of the contract price as a result of payment of social security taxes or other employment taxes (R4, tab 6).

10. On 29 April 2009, AECOM submitted a certified claim in the amount of $2,051,551 for F.I.C.A. taxes paid from 1 August 2008 through 31 December 2009 on the basis of mutual mistake of fact and breach of the covenant of good faith and fair dealing (R4, tab 7).

11. On 18 June 2009, the CO issued a final decision denying the claim on the grounds stated previously (R4, tab 8).

12. AECOM appealed the CO's final decision to this Board on 26 June 2009. We docketed the appeal as ASBCA No. 56861 on 29 June 2009.

DECISION

Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law and no disputes over material facts remain. FED. R. CIV. P. 56(c); *Mingus Constructors, Inc.*, 812 F.2d 1387, 1390-92 (Fed. Cir. 1987). The fact that both parties have moved for summary judgment does not mean that we have to grant summary judgment as a matter of law for one side or the other. Summary judgment in favor of either party is not proper if disputes remain as to material facts. A material fact is one that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). We evaluate each party's motion on its own merits, taking care to draw all reasonable inferences against the party whose motion is under consideration. *Mingus*, 812 F.2d at 1390-91.

The government moves for summary judgment, alleging that there is no basis in the FAR for increasing the contract price for after-imposed F.I.C.A. taxes. The government argues that FAR 52.229-6(b) excepts social security or other employment taxes from the definition of an after-imposed tax and that FAR 16.202-1 prohibits adjustment of a firm fixed-price contract on the basis of the contractor's cost experience. As a result, the government concludes that it is entitled to summary judgment as a matter of law. Relying on *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005), AECOM moves for partial summary judgment, alleging that the Act breached the covenant of good faith and fair dealing. According to AECOM, the Act specifically targeted the F.I.C.A-tax exemption for offshore subsidiaries, destroying its reasonable expectations regarding the fruits of its contract, namely that it would receive the full contract price. Thus, AECOM asserts that it is entitled to $2,051,551 as a matter of law.

The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner. The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract. The duty applies to the government just as it does to private parties. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); *Centex*, 395 F.3d at 1304. In *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829-30 (Fed. Cir. 2010), the Court of Appeals for the Federal Circuit elaborated on the duty of good faith and fair dealing as follows:

> Cases in which the government has been found to violate the implied duty of good faith and fair dealing typically involve

> some variation on the old bait-and-switch. First, the government enters into a contract that awards a significant benefit in exchange for consideration. Then, the government eliminates or rescinds that contractual provision or benefit through a subsequent action directed at the existing contract....
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> ....
>
> ...[In this case,] there was no breach of the government's implied duty of good faith and fair dealing because the [government's] actions...were (1) not "specifically targeted," and (2) did not reappropriate any "benefit" guaranteed by the contracts, since the contracts contained no guarantee that [the contractor's] performance would proceed uninterrupted. *Cf. id.* [*Centex*] at 1306.
>
> The [government's] actions [were] not akin to the "specifically targeted" government action in *First Nationwide*, *Centex*, or *Hercules*. In those cases, the subsequent government action was for the specific purpose of eliminating an express bargained-for benefit in the contracts and "sole[ly] impact[ed]" th[o]se contracts.

Contrary to AECOM's contention, *Centex* is not controlling. In return for Centex assuming all the assets and liabilities of certain failing thrifts, the Federal Savings and Loan Corporation (FSLIC) agreed to offset part of the liabilities of the acquired thrifts through contracts called Assistance Agreements. FSLIC agreed to define certain assets of acquired thrifts, including outstanding loans, as "covered assets," and to make assistance payments to Centex in an amount equal to the difference between the book basis of the covered assets and the value of those assets when they were sold or written down. As a result, Centex was able to take deductions for losses on covered assets even though they were fully reimbursed by FSLIC. Congress subsequently enacted retroactive remedial legislation disallowing the deductions. As a result, Centex was deprived of a significant, central benefit of its contract. Under these facts, the Court held that the government had breached its duty of good faith and fair dealing. *See First Nationwide Bank*, 431 F.3d 1342, 1350-51 (Fed. Cir. 2006) (government breached covenant of good faith and fair dealing on facts similar to those of Centex).

Unlike the contracts in *Centex*, AECOM's contract did not contain a bargained-for benefit. AECOM's contract was silent with respect to the tax status of offshore subsidiaries. As a result, we conclude that the government did not breach its implied duty of good faith and fair dealing. *Precision Pine*, 596 F.3d at 829.

It is undisputed that the FAR does not provide a basis for relief from after-imposed F.I.C.A. taxes. Accordingly, the government's motion for summary judgment is granted only as to the implied duty of good faith and fair dealing. AECOM's motion for partial summary judgment is denied for the reasons stated above.

Dated: 13 October 2010

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

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. 56861, Appeal of AECOM Government Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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