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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OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

AECOM Government Services, Inc. (AECOM) seeks an equitable adjustment of $2,051,551 for after-imposed FICA taxes resulting from enactment of The Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act or Act), 26 U.S.C. § 3121z. The HEART Act was enacted approximately six months after contract award. AECOM seeks recovery on two theories: breach of the warranty of good faith and fair dealing and reformation on the ground of mutual mistake. On cross-motions for summary judgment, we held that the FAR did not authorize payment of after-imposed FICA taxes and denied AECOM's breach of warranty claim. *AECOM Government Services, Inc.*, ASBCA No. 56861, 10-2 BCA ¶ 34,577. In this motion, the government argues that AECOM has failed to establish a mistake that will support reformation. AECOM asserts that there are disputed issues of material fact which make summary judgment inappropriate. We grant the government's motion and deny the appeal.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 31 December 2007, the Joint Contracting Command—Iraq/Afghanistan (JCC-IA) awarded the subject contract to AECOM to establish a national logistics depot at Taji, Iraq (R4, tab 1 at 2). The contract was an indefinite quantity contract with an initial ordering period of 1 January 2008 to 31 December 2009 (R4, tab 1 at 2).

2. AECOM GSS, Ltd., a wholly owned offshore subsidiary of AECOM, performed the work (R4, tab 2 at 2).

3. At award, offshore subsidiaries of United States corporations contracting with the United States government were not required to pay FICA taxes for United States citizens and residents working abroad. *See* 26 U.S.C. § 3121z.

4. As a result, AECOM did not include FICA taxes in its labor rates for this contract (gov't mot at 3; R4, tab 3).

5. The HEART Act was signed into law on 17 June 2008. The Act required that wholly owned subsidiaries of United States corporations contracting with the United States government pay FICA taxes for United States citizens and residents working abroad (gov't mot., attach. 2 at 2).

6. AECOM began paying FICA taxes relating to work under this contract on 1 August 2008 (R4, tab 2).

7. On 29 April 2009, AECOM submitted a certified claim to the contracting officer requesting an equitable adjustment of $2,051,551 for FICA taxes paid from 1 August 2008 through 31 December 2009 (R4, tab 7). The claim advanced two theories of recovery: breach of the warranty of the implied covenant of good faith and fair dealing and reformation based on mutual mistake of fact.

8. The contracting officer denied the claim on 18 June 2009 (R4, tab 8).

9. On 26 June 2009, AECOM appealed the contracting officer's final decision to this Board, where it was docketed as ASBCA No. 56861.

DECISION

Summary judgment is properly granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a) (eff. 12/1/10). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of proof and all significant doubt over factual issues must be

resolved in the favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). In responding to a motion for summary judgment, more is required than mere assertions of counsel. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The non-moving party must set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial. *Barmag Barmer Maschinenfabrik AG v. Murat Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

Reformation of a contract on the ground of mutual mistake is an extraordinary remedy. *National Australia Bank v. United States*, 452 F.3d 1321, 1329 (Fed. Cir. 2006). To prevail, the party seeking reformation must satisfy the following elements:

> (1) the parties to the contract were mistaken in their belief regarding a fact; (2) that mistaken belief constituted 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 seeking reformation.

Bank of Guam v. United States, 578 F.3d 1318, 1330 (Fed. Cir. 2009), citing *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990); *Dairyland Power Co-Op v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994); *National Australia Bank*, 452 F.3d at 1329; *see* RESTATEMENT (SECOND) OF CONTRACTS §§ 151-52, 155 cmt. a (1981). The burden of proof is on the party seeking reformation and the general rule is that mistake must be proved by clear and convincing evidence. *Philippine Sugar Estates*, 247 U.S. 385, 391 (1918) (evidence of the "clearest and most satisfactory character"); *National Australia Bank*, 452 F.3d at 1329; RESTATEMENT, § 155 cmt. c. Failure to satisfy any one of these elements will result in denial of relief. *Bank of Guam*, 578 F.3d at 1330; *Dairyland*, 16 F.3d at 1202.

The following facts are undisputed. At award, offshore subsidiaries of United States corporations were exempt from paying FICA taxes. Approximately six months after award, Congress passed the HEART Act which, now, required offshore subsidiaries of United States corporations doing business with the United States to pay FICA taxes for United States citizens and residents working abroad. As a result, AECOM had to pay $2,051,551 in FICA taxes that it did not include in its labor rates.

AECOM has not satisfied the first element of a claim for mutual mistake. A mistake that will support reformation is defined as follows:

> A "mistake" that can support reformation is a belief that is not in accord with the facts. Restatement (Second) of Contracts § 151. To satisfy this element of a reformation claim, [the party seeking reformation] must allege that he

> held an erroneous belief as to an *existing* fact. If the *existence* of a fact is not known to the contracting parties, they cannot have a belief concerning that fact; therefore, there can be no "mistake." [Emphasis added]

Atlas Corp., 895 F.2d at 750 (1990).

Comment a. to § 151 of the Restatement further provides as follows:

> [T]he erroneous belief must relate to the facts as they exist at the time of the making of the contract. 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 here.

Based upon the foregoing, the HEART Act was not, and could not, have been within the contemplation of the parties when they entered into the contract because it was not a fact in existence until approximately six months after award. *E.g.*, *Dairyland Power*, 16 F.3d at 1202 (availability of commercial reprocessing of spent nuclear fuel in the future did not constitute an existing fact at the time of the sale contract); *American Employers Insurance Co. v. United States*, 812 F.2d 700, 705 (Fed. Cir. 1987) (reformation inappropriate where neither party contemplated the possibility that former employees would bring claim for latent occupational injuries years after final settlement); *R.C. Hedreen Co.*, ASBCA No. 24867, 81-1 BCA ¶ 15,021 at 74,331 (parties' failure to anticipate the future change in the law with respect to payment of interest which came into being as a result of the Contract Disputes Act was not a mutual mistake "as that doctrine is known to the law"). We are also mindful of the fact that AECOM could have negotiated a clause to protect itself from a change to the tax status of offshore subsidiaries. *See United States v. Winstar Corp.*, 518 U.S. 839, 881-82 (1996). No such clause was included in this contract and there is no evidence that such a clause was discussed during negotiations.

The cases cited by AECOM are inapposite. In *Aluminum Co. of America v. United States*, 499 F.Supp. 53, 80 (W.D. Pa. 1980), relief was granted under the doctrine of impracticability. Reformation was granted in *Southwest Welding & Mfg. Co. v. United States*, 179 Ct. Cl. 39, 25 (1967), due to a mutual mistake about the cost of steel. *National Presto Industries, Inc. v. United States*, 167 Ct. Cl. 749, 769-70 (1964), formulated a remedy for "cases of mutual mistake in which the contract...allocates the specific risk to neither party—and the side from whom relief is sought received a benefit...of the type it contemplated obtaining from the contract, and would have been willing if it had known the true facts from the beginning, to bear a substantial part of the additional expenses." In *Sunswick Corp. v. United States*, 109 Ct. Cl. 772, 789-90 (1948), relief was granted under the Changes clause. Reformation was granted in *Walsh v. United States*, 121 Ct. Cl. 546, 590 (1952) because the parties knew of a possible or

probable impending wage increase for first-class skilled mechanics in shipyards when the contract was entered into. None of these cases suggests that reformation is appropriate for a future change in the law.

In addition to the undisputed material facts set forth at the beginning of this decision, AECOM offers five additional facts which it alleges are material:

> (1) At the time the parties entered into the Contract, the Government believed that AECOM was exempt from paying FICA taxes on the labor associated with the Contract.
>
> (2) At the time the parties entered into the Contract, the Government was aware that AECOM did not include FICA taxes in its proposed labor rates for the Contract.
>
> (3) The Government knew when entering the Contract that it was labor-intensive and that AECOM's bid for the Contract was based on a prediction of labor costs. The FICA tax exemption was therefore a significant part of the labor cost projections, and therefore the total cost projections, provided in AECOM's bid.
>
> (4) The parties' belief that AECOM would not have to pay FICA taxes on labor associated with the Contract was mistaken.
>
> (5) The parties' mistaken belief that AECOM would not be required to pay FICA taxes on the Contract was a basic assumption of the Contract.

(App. opp'n at 2-6)

The facts proposed by AECOM do not pass the test of materiality. A fact is material if it may affect the outcome of the decision. *Liberty Lobby*, 477 U.S. at 248. AECOM relies, in large part, on the deposition testimony of MAJ Renee Russo, the government's price evaluation and Source Selection Evaluation Board Chair, as support for facts (1) through (3). MAJ Russo testified that at the time of award, she was aware that AECOM was not subject to FICA taxes, that AECOM did not include FICA taxes in its labor rates, that the contract was labor intensive, and that if FICA taxes had been included, AECOM's labor costs would have been significantly higher (gov't reply, attach. 1 at 36-39). These facts are not in dispute and have no bearing on AECOM's claim for mutual mistake. AECOM has not established a factual predicate for facts (4) and (5). Moreover, these allegations depend upon events that may or may not take

place in the future. As stated in *Atlas Corp*., 895 F.2d at 750, "[i]f *the existence* of a fact is not known to the contracting parties, they cannot have a belief concerning that fact; therefore, there can be no "mistake"' (emphasis added). Thus, we conclude that facts (4) and (5) are not material.

The government's motion for summary judgment is granted. ASBCA No. 56861 is denied.

Dated: 19 January 2011

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