UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 5, 2008

CBCA 802

GULF SHORES, LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Michael J. Caywood of Dresser, Dresser, Haas & Caywood, P.C., Sturgis, MI, counsel for Appellant.

Jean Hardin, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **POLLACK**, **STEEL**, and **DRUMMOND**.

DRUMMOND, Board Judge.

Gulf Shores, LLC (GS) alleges that the Department of Homeland Security, Federal Emergency Management Agency (FEMA), owes it $146,632.50 under a purchase order for the lease of mobile home pads in Port Charlotte, Florida.[1]

[1] Appellant originally sought $191,029.50, which included, *inter alia*, $44,460 for attorney fees and costs relating to a dispute between appellant and a local utility authority in Florida. At appellant's request, by order dated April 23, 2008, the Board dismissed with prejudice appellant's claim for attorney fees and ordered that appellant's claim be reduced to $146,632.50.

Respondent has filed a motion to dismiss, or in the alternative, a motion for summary relief, arguing that GS's claim should be dismissed or denied because appellant has failed to state a claim upon which relief can be granted. GS opposes the motion.

Background[2]

On September 7, 2004, FEMA issued purchase order (PO) number HSFEE-04-L-4097 to GS. The PO was for the lease of mobile home pads (pads) on which to place FEMA travel trailers to be used for temporary housing in the aftermath of the devastation caused by Hurricane Charlie. The pads were located at Vizcaya Lakes, a manufactured home community owned and operated by GS, a Florida limited liability company, with its principal place of business located in Michigan. Appeal File, Exhibits 1, 13; Supplemental Appeal File, Exhibit 25; Complaint ¶ 3; Respondent's Statement of Uncontested Facts (RSUF) ¶ 3. The PO was signed only by FEMA and stated:

> This is a firm fixed price purchase order for the lease of one hundred & seventy five (175) . . . trailer pads. The lease price is $775.00 per month, per pad including all utilities including electricity. The total amount of this order is $813,750.00. The lease period for one hundred & forty-eight (148) pads is from 25 August 2004 to 25 February 2005. The lease period for the remaining twenty seven (27) pads is from 1 September 2004 to 1 March 2005.

Appeal File, Exhibit 1. The PO incorporated as an attachment a "Mobile Home Unit Pad Lease" agreement dated August 25, 2004. Section 2 of the agreement stated:

> The Lessor agrees to provide and maintain all water, sanitary, sewage, electrical, [and] other utilities connections provided on the site at the time of execution of this lease.

Id. Section 4 of the agreement stated that the monthly rental amount would remain at the fixed rate "for a period not to exceed one (1) year from the date of the lease." *Id.*

Neither the PO nor the agreement included any provision for adjustment of the fixed rental rate prior to August 25, 2005. The PO also incorporated by reference Federal Acquisition Regulation (FAR) clause 52.212-4, CONTRACT TERMS AND CONDITIONS --COMMERCIAL ITEMS (2004), which states, in relevant part, that "the contract price includes all applicable Federal, State, and local taxes and duties." Appeal File, Exhibit 1.

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[2] The Board considers the following facts not to be in dispute.

The PO was modified once to extend the leases for all 175 pads for three months at $775 per month. The modification was signed by the parties and stated:

> The lease for 148 units ended on 2/25/2005 and is extended through 5/25/2005. The lease for 27 additional units ended on 3/01/2005 and is extended through 5/31/2005. The total amount of this modification is increased from $813,750.00 to $1,220,625.00.

Appeal File, Exhibit 8. The modification did not include any provision for adjusting the fixed rental rate. *Id.*

GS was authorized by the State of Florida to operate Vizcaya Lakes pursuant to an approved prospectus. The cover letter for the prospectus, dated October 1, 1999, from the Florida Department of Business and Professional Regulation, states, *inter alia*, that:

> The park owner is obligated by law to furnish a copy of an approved prospectus and all exhibits to each home owner. An approved prospectus must be delivered by the park owner to each home owner . . . prior to increasing the lot rental if no prospectus has been given.

Supplemental Appeal File, Exhibit 23. An attachment to that letter stated, *inter alia*, that "upon delivery of the prospectus to a prospective lessee, the rental agreement is voidable by the lessee for a period of 15 days." *Id.* There is no evidence in the record that GS provided a copy of the prospectus to FEMA or that FEMA agreed to be bound by the terms of the prospectus.

The prospectus addressed generally fees and charges associated with water and sewer services, including special assessments, hookup fees, and pass-through fees. No dollar amounts were stated in the prospectus for any fees, charges, and assessments. Supplemental Appeal File, Exhibit 23. There is no evidence in the record that FEMA agreed to pay any fees in addition to the fixed monthly rental or that FEMA intended the PO to incorporate any of the terms of the prospectus.

Water service was supplied to the pads by the El Jobean Water Association (EJWA) through a system of underground pipes. GS had paid local and county impact fees for water services prior to September 2004. Consequently, GS interpreted the PO as requiring it to pay these fees in connection with providing and maintaining water services to the pads leased to FEMA. GS has stated that the local water authority waived these fees in connection to it providing water services to the pads leased to FEMA. Appellant's Statement of Uncontested

Facts (ASUF) ¶¶ 6, 7; Affidavit of Michael Sussex (Sept. 27, 2007) ¶¶ 9, 10; Supplemental Appeal File, Exhibit 23.

Sewer services were provided to the pads by the Riverwood Community Development District (RCDD) through a system of underground pipes. The RCDD, like the EJWA, was a local utility authority in Florida. ASUF ¶ 8. A dispute arose between the RCDD and GS concerning the payment of sewer impact fees. Several months before FEMA issued this PO, the RCDD wrote to GS seeking payment of sewer impact fees for approximately seventeen properties. Appeal File, Exhibit 13. There is no evidence in the record that GS received the letter from the RCDD. GS claims that it was unaware that such fees were applicable to the temporary FEMA disaster units installed at Vizcaya Lakes. GS has stated that it did not anticipate paying any sewer impact fees under this PO. Complaint ¶ 15; ASUF ¶ 3; Appeal File, Exhibit 11.

The total amount of the PO remained unchanged at $1,220,625. FEMA has paid GS the full amount of the PO. Appeal File, Exhibit 9.

On June 23, 2006, GS sent to FEMA an invoice for increased costs. The increased costs were for sewer impact fees paid to the RCDD for the period September 2004 to May 2005. The sewer impact fees totaled $146,632.50 and included: "Retroactive sewer fee increase from $27.35 to $50.21 per month Sept. – May" totaling $36,004.50; "Sewer-hook up fees" totaling $108,360; and "processing fees" totaling $2205. Appeal File, Exhibit 12. GS has referred to the claimed fees collectively as sewer impact fees. *Id.*, Exhibit 11.

GS submitted a certified claim to the contracting officer (CO) in the amount of $146,632.50 on October 11, 2006, alleging, *inter alia*, breach of contract due to FEMA's refusal to reimburse GS for the sewer impact fees paid to the RCDD. GS stated that although it had never before paid sewer impact fees, the RCDD had insisted that sewer impact fees were owed for the "temporary housing units at Vizcaya Lakes constructed by GS as part of the Hurricane Charlie effort." Appeal File, Exhibit 14. GS asserted that the sewer impact fees were not customary sewer fees but, rather, special assessments, and as such, were FEMA's obligation. *Id.*, Exhibit 11.

The CO denied this claim, stating that the contract required GS "to provide and maintain . . . sewer services . . . ." The CO noted that the PO was fixed-price and therefore placed the risk of these fees on GS. The CO noted further that the contract lacked any provision whereby GS could pass these fees to FEMA. Appellant filed a timely appeal with the Board. Appeal File, Exhibits 13, 14.

Discussion

The parties have submitted extensive briefs. We have considered all of their arguments, whether or not we mention or discuss them. The Government claims that it is entitled to summary relief since as a matter of law, based on the terms of the PO, appellant's claim must fail.

We are guided by the well-established rules applicable to summary relief motions. Summary relief is appropriate where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party shoulders the burden of proving that no question of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

However, under Rule 56(e) of the Federal Rules of Civil Procedure, which this Board looks to for guidance, more than mere allegations are necessary to defeat a properly supported motion for summary relief. *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554, at 166,175 (citing *Fireman's Insurance Co. of Newark, N.J. v. DuFresne*, 676 F.2d 965 (3d Cir. 1982); *Tilden Financial Corp. v. Palo Tire Services, Inc.*, 596 F.2d 604 (3d Cir. 1979); *General Dynamics Corp.*, DOT CAB 1232, 83-1 BCA¶ 16,386, at 81,459).

Respondent's motion for summary relief restates the reasons the contracting officer gave for denying appellant's claim. Respondent maintains that appellant's claim fails because the contract required appellant to provide and maintain sewer services to the pads. Respondent asserts that there is no provision in the contract to adjust the fixed price to include these fees. Respondent also asserts that appellant could have negotiated a provision to pass these fees to respondent, but neglected to do so.

Appellant responds that the Government breached the contract by refusing to reimburse it for the sewer impact fees paid to the RCDD. Appellant asserts that impact fees are special assessments and in the absence of a contract provision requiring it to pay these fees, the Government is liable. Alternatively, appellant alleges that it is entitled to the claimed amount based upon the doctrines of breach of duty of good faith and fair dealing and unjust enrichment.

Breach of Contract

In order to prevail on a breach of contract claim, appellant must establish that: (1) a valid contract existed between it and the Government; (2) the contract gave rise to duties or obligations; (3) the Government breached its duties or obligations; and (4) the breach resulted in damages. *See San Carlos Irrigation and Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989); *Die Casters International, Inc. v. United States*, 73 Fed. Cl. 174, 195 (2006).

At the outset, it must be emphasized that a purchase order is an offer to enter into a unilateral contract, which can be accepted by a contractor when it performs pursuant to the order's terms. *Reliable Disposal Co*., ASBCA 40100, 91-2 BCA ¶ 23,895; *L&D Industries, Inc.*, ASBCA 38239, 91-2 BCA ¶ 23,718; *Klass Engineering, Inc*., ASBCA 22052, 78-2 BCA ¶ 13,236. It is undisputed that appellant accepted the PO by performing pursuant to its terms. We find that a unilateral contract existed between the Government and appellant.

Appellant does not allege that the Government breached any express or implied contractual duty. Rather, appellant alleges that the Government's refusal to reimburse it for the fees paid to the RCDD constitutes a breach. Appellant has offered no evidence which supports this allegation. Rather, appellant asserts that in the absence of a provision requiring it to pay these fees, the fees were the obligation of the Government. We are not persuaded.

Drawing all inferences in favor of appellant, it has failed to offer any evidence that the Government breached any contractual duty by refusing to reimburse GS for the fees paid to the RCDD. Since there is no express provision in the PO itself concerning the Government's liability for the claimed costs, appellant, to recover its claim, must prove that the parties intended that the Government would be responsible for these costs beyond the stated fixed amount. However, as shown in the factual summary, there is simply no evidence of such intent.

It is undisputed that the contract was a fixed-price contract. It is further undisputed that the contract required appellant to provide and maintain all utilities, including any necessary connections, and to pay all applicable taxes at the fixed price, and contained no clause shifting appellant's risk of loss to the Government. Therefore the absence of a provision specifically mentioning sewer impact fees or special assessments does not change the nature of the contract, leaving it up to appellant to investigate its liability for sewer impact fees as it did for the water impact and county impact fees.

It is well settled that a contractor in a fixed-price contract assumes the risk of unexpected costs. *J. Filiberto Sanitation, Inc.*, VABCA 2696, 88-3 BCA ¶ 21,160, at 106,813 (citing *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 691 (Ct. Cl. 1975); *McNamara Construction of Manitoba, Ltd. v United States*, 509 F.2d 1166 (Ct. Cl. 1975); *Sperry Rand Corp. v. United States*, 475 F.2d 1168 (Ct. Cl. 1973)). Performance rendered more burdensome or costly by an unforseen cause is insufficient to entitle a contractor to compensation beyond that provided for in the contract. Appellant has failed to produce any evidence that the parties intended that the Government assume any risk if appellant incurred unanticipated expenses. *See ITT Arctic Services*, 524 F.2d at 691. Since the contract did not obligate the Government to pay sewer impact fees, we find that the Government did not breach the contract by refusing to reimburse appellant for the fees paid to the RCDD.

We find that appellant has failed to offer evidence in response to the Government's motion that would meet its burden of proving the second and third elements of a breach claim. We hold that, on the record before us for purposes of the Government's motion, there are no disputed material facts and undisputed facts fail to support appellant's breach claim. The Government is, therefore, entitled to judgment in its favor as a matter of law.

Ambiguity

In its claim, appellant alleges that the Government is liable to it for the sewer impact fees because the contract is ambiguous. We are not persuaded.

Contract language must be read in accordance with its express terms and plain meaning. *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1543 (Fed. Cir. 1993); *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992); *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 976 (Ct. Cl. 1965). When a provision in a contract is susceptible to more than one reasonable interpretation, it is ambiguous. *Corners & Edges, Inc. v. Department of Health and Human Services*, CBCA 648-R, 08-1 BCA ¶ 33,741 (2007) (citing *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006)). If the ambiguity is "obvious, gross, [or] glaring," then it is patent, and the contractor has a duty to seek clarification of the ambiguity before entering the contract or suffer the consequence of its own erroneous interpretation. *H & M Moving, Inc. v. United States*, 499 F.2d 660, 671 (Ct. Cl. 1974); *see also Newsome v. United States*, 230 Ct. Cl. 301 (1982). By contrast, if the ambiguity is not glaring, substantial, or patently obvious, then it is latent and the contractor must establish reliance on its interpretation. *Grumman Data Systems Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996); *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1429 (Fed. Cir. 1990). In the event we determine that the ambiguity in the contract was not patent, then "the contract is construed against its drafter if the interpretation

advanced by the nondrafter is reasonable." *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988).

For its part, respondent argues that the contract language is clear and appellant is not entitled to the requested relief and accordingly, appellant is responsible for all costs associated with providing and maintaining utilities and taxes. Respondent notes that the contract includes no provision for adjusting the fixed price during the lease period. Respondent argues further that the sewer impact fees constitute a tax which is appellant's responsibility.

Appellant contends that the wording in section 2 of the contract is ambiguous. According to appellant, sewer impact fees are not customary sewer fees within the meaning of section 2 of the contract, but instead special assessments which are the responsibility of the Government. Appellant does not explain the difference between impact fees for water and sewer, other than to say that it had never paid any impact fees for sewer services before this contract. Appellant's naked characterization that the fees assessed by the RCDD are special assessments because they had never been assessed before is not *per se* evidence that the contract is ambiguous, nor is it evidence that the fees are special assessments. Moreover, appellant's alleged interpretation of section 2 as excluding impact fees for sewer services is not reasonable, given that appellant initially interpreted the contract as requiring it to pay water impact fees and county impact fees for the pads leased to the Government. It is undisputed that appellant did not make any inquiry and performed consistent with the stated contract terms.

Drawing all interferences in favor of appellant, the contract, plainly read, sets a fixed price for the pads, including all utilities and taxes, and does not provide for any adjustment in the contract price due to the imposition of sewer impact fees or special assessments. The absence of a provision addressing sewer impact fees or special assessments does not change the nature of the contract. It leaves to appellant to investigate its liability for any sewer impact fees or assessments, as it did for the water impact fees, and to include that in the contract, if it expects compensation. Section 2, after all, says nothing about fees; it requires appellant to provide and maintain utility connections, regardless of what those connections might cost. We find that the undisputed record discloses nothing more than a unilateral error of judgment by appellant in accepting the contract with FEMA.

Appellant also advances that the contract, through the Florida Mobile Home Act (FMHA), incorporates the prospectus, thereby "providing numerous provisions clearly placing the burden of impact fees squarely on the shoulders of the lessee, FEMA." Appellant argues that the FMHA makes it clear that a prospectus is deemed to be incorporated into the rental agreement. Fla. Stat. § 723.031(10) (2004). Further, appellant alleges that it would

be disingenuous for FEMA to now argue the FMHA does not apply, given that the Government referred to it when distinguishing between a property tax and sewer utility fee in its motion.

Respondent argues that no provision of the FMHA or prospectus affects the terms of the firm fixed-price contract because the contract makes no reference to either the FMHA or prospectus and they were not submitted to the agency during negotiations. The Government alleges appellant's argument is misplaced because the FAR governs the contract between appellant and the Government. Further, respondent asserts that the earlier reference to Florida law when distinguishing between a property tax and sewer utility fee was for persuasive value only.

Appellant's reliance upon Florida law is misplaced. Federal law controls the interpretation of contracts, including leases, to which the Federal Government is a party. *Forman v. United States*, 767 F.2d 875, 880 (Fed. Cir. 1985); 41 U.S.C. § 602 (2000). Furthermore, the plain language of this contract contained no reference to the FMHA or prospectus. There is no evidence that the parties intended the contract to incorporate either, and significantly, at the time the contract was performed, appellant did not expect to charge respondent the contested fees. The PO, even if the FMHA was incorporated, had nothing in it to hold respondent to the claimed fee. We find that the terms of the contract between appellant and respondent are restricted to the provisions stated or specifically incorporated into the contract. *G. L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963). Accordingly, the Board finds no merit in this argument.

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

Mistake

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 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 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. To establish a mutual mistake warranting

reformation, appellant must first show that both parties to the contract were mistaken in their belief regarding an existing fact.

Appellant asserts that it had never been assessed these fees before. Appellant's understanding and expectation concerning these fees after contract award is not a mistake as to an existing fact as:

> "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. [1941]) ("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, 16 F.3d at 1203. Appellant's mistaken belief about whether it would be required to pay these fees in the future after contract award cannot form the basis for a mutual mistake of fact. Furthermore, appellant has presented no evidence as to respondent's belief if any as to the fees at the time the purchase order was issued. It is therefore immaterial whether appellant's belief about the likelihood of these fees in the future was reasonable or not, and we need not address that issue.

Drawing all inferences in favor of appellant, appellant has failed to offer evidence in response to the Government's motion that would meet the burden of proving the first element of mutual mistake of fact. Absent proof of a mutual mistake regarding an existing fact, whether the other elements might be sustained is immaterial. *Alfair Development Co.*, ASBCA 53119, et al., 05-2 BCA ¶ 32,990, at 163,514, *aff'd*, 208 Fed. Appx. 840 (Fed. Cir. 2006).

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

In its opposition papers, appellant offers several other legal theories, such as unjust enrichment and breach of duty of good faith and fair dealing to support its position. We have considered them all, but are not persuaded that any of them – singly or in combination – can defeat the Government's motion on this record.

Decision

Respondent's motion for summary relief is granted. This appeal is **DENIED**.

JEROME M. DRUMMOND
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

CANDIDA S. STEEL
Board Judge