UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS IN PART DENIED: March 23, 2007

CBCA 461

P.J. DICK, INCORPORATED,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John C. Person of Person & Craver LLP, Washington, DC, counsel for Appellant.

Timothy C. Tozer, Office of Regional Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **DeGRAFF**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, P. J. Dick, Incorporated, was awarded a contract by the General Services Administration (GSA or respondent) to construct a facility for the National Oceanic & Atmospheric Administration's National Environmental Satellite Data and Information Services in Suitland, Maryland. Appellant filed a claim alleging that it incurred additional excavation costs in the amount of $290,863 during the installation of underground plumbing. Respondent's contracting officer issued a decision dated November 30, 2005,

from which appellant appealed.[1] Thereafter appellant filed a complaint. Respondent has filed a motion to dismiss the second and third counts of appellant's complaint. We deny the motion.

Background

Appellant contends its plumbing subcontractor encountered additional costs arising from the excavation portion of changed plumbing work as the result of ground water and soil conditions that were not contemplated at the time of contracting. Complaint ¶ 9. According to appellant, during a meeting on January 22, 2004, the parties agreed to process certain contract modifications using "placeholder" rates for excavation that were less than the actual rates being incurred for the cost of deep, shallow, and foundation drain excavation. Appellant alleges that during that meeting the parties agreed that the costs of these modifications, calculated using the "placeholder" rates, would be "trued-up" later with supplemental modifications that would include the actually incurred incremental cost of excavation that exceeded the "placeholder" rates. Complaint ¶¶ 11, 21. Relying upon the parties' agreement, appellant agreed to use the "placeholder rates" in its cost proposals that had been prepared previous to the January 22, 2004, meeting and were ready for submission. Appellant included the actually incurred incremental excavation costs in five additional, separate pricing proposals, prepared at respondent's direction, and submitted these to respondent shortly after the meeting on January 22, 2004. Complaint ¶¶ 12, 22.

Respondent then issued Modification PS 07 ("Plumbing Changes as described in CE02") on February 24, 2004, and PS 10 ("Groundwater changes, CE03") (the two modifications) on April 7, 2004, based upon the "placeholder" rates. The two modifications included the following statement: "Settlement of this change includes all costs, direct, indirect, impact and delay, associated with this change order." Complaint ¶¶ 24, 25. On April 6, 2004, respondent rejected the five additional, separate pricing proposals which included the actually incurred incremental costs, stating that the two modifications settled all costs associated with the changes. Complaint ¶ 26. Appellant emphasized to respondent

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[1] This case was docketed at the General Services Administration Board of Contract Appeals (GSBCA) as GSBCA 16923. On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391, the GSBCA was terminated and its cases, personnel, and other resources were transferred to the newly-established Civilian Board of Contract Appeals (CBCA). This case was docketed by the CBCA as CBCA 461. The holdings of the GSBCA and other predecessor boards of the CBCA are binding on this Board. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464 (Jan. 18, 2007).

in subsequent communication that respondent had been made aware that appellant was incurring excavation costs in excess of those contained in the cost proposals. Appellant further claimed that the cost proposals for the two modifications were submitted with "placeholder" rates, with the parties' understanding that such rates were to be used to calculate partial payments, with additional costs to be paid in the future. Complaint ¶ 27. Respondent rejected appellant's position, however, maintaining that the two modifications served as accords and satisfactions of the matters addressed in the change orders. Complaint ¶¶ 33, 36. Appellant thereafter submitted a claim to the contracting officer seeking the additional costs, and the contracting officer denied the claim by final decision dated April 18, 2006. Complaint ¶¶ 37, 38.

Discussion

Motion to Dismiss Count II - Mutual Mistake

Respondent moves to dismiss count II of the complaint, which seeks reformation of the two modifications due to mutual mistake of material fact. Respondent contends that this count fails as a matter of law because the parties were not mistaken as to an existing material fact. Respondent's Memorandum in Support of Motion to Dismiss at 2. Respondent's motion sets forth the elements which must be proved with regard to a mutual mistake of fact:

> (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.

Dairyland Power Cooperative v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994); *see also Workrite Uniform Co. v. General Services Administration*, GSBCA 14839, 99-2 BCA ¶ 30,455, at 150,464; *Altmayer v. General Services Administration*, GSBCA 12720, 94-3 BCA ¶ 27,070, at 134,904; *Management & Training Corp. v. General Services Administration*, GSBCA 11182, et al., 93-2 BCA ¶ 25,814, at 128,520.

Respondent states that the fact about which the parties are mistaken must be an existing fact, not a fact that will come into existence in the future or a party's prediction or judgment as to events to occur in the future. *See, e.g.*, *Dairyland*; *Alfair Development Co.,* ASBCA 53119, et al., 05-2 BCA ¶ 32,990. Respondent states further:

> Appellant's claim for mutual mistake must fail because it is not based on an *existing* fact. Rather, Appellant's position is that the parties verbally agreed that at some future date, once Appellant's actual excavation costs were known, they would sit down and negotiate a final settlement price for the excavation costs. Thus, even accepting Appellant's factual statements as true, because Appellant cannot, and has not established that the parties held an erroneous belief as to an existing fact, Count II must be dismissed.

Respondent's Motion to Dismiss at 6.

Appellant agrees with respondent's explanation of the law of mutual mistake and the four-part test for seeking reformation based on mutual mistake. Appellant also agrees with respondent that in order to prevail under the theory of mutual mistake appellant must show that the parties to the contract held an erroneous belief as to an existing fact. Appellant disagrees, however, with respondent's application of the law of mutual mistake to the facts of the instant appeal, and asserts that it has pled a legally sufficient claim in count II for reformation based on mutual mistake of existing fact. Appellant maintains that the material fact over which the parties were mutually mistaken was not the ultimate determination of the incremental excavation costs as alleged by respondent. Rather, the fact over which the parties were mutually mistaken was the existence of the alleged agreement itself, which came into existence before the two modifications were issued, that the incremental, actually incurred excavation costs would be paid for in a subsequent modification. Complaint ¶ 50. Appellant therefore argues that "framed in this manner, that fact was very much in existence at all relevant times. Accordingly, Respondent's challenge as to Count II must fail." Appellant's Opposition to Respondent's Motion (Appellant's Opposition) at 3-4.

Appellant's characterization of the issue of fact is correct. Based upon the allegations in the complaint, the material fact at issue is whether or not there was an agreement. While that alleged agreement may have contemplated a determination in the future, that agreement was alleged to have existed before the two modifications were issued. As such, the existence of that agreement is an issue of existing fact, not a future fact. We deny respondent's motion to dismiss count II, which was premised on appellant's failure to plead an issue of existing fact.[2]

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[2] In denying the motion to dismiss count II, we do not rule that the facts pled by appellant prove mutual mistake. Appellant must meet its burden of proof in future proceedings.

Motion to Dismiss Count III - Equitable Estoppel

In count III, appellant maintains that respondent is equitably estopped from denying the existence of the alleged agreement to "true-up" the plumbing excavation costs by submission of additional pricing proposals that would include the incremental, actually incurred costs, and such estoppel would preclude respondent from asserting the defense of accord and satisfaction. As the basis for its motion to dismiss count III, respondent characterizes the allegations of that count as stating a reliance on promises of future intent, i.e., an alleged agreement that a future determination will be made as to additional costs. Respondent therefore maintains that count III does not actually plead equitable estoppel as asserted by appellant, but rather seeks to establish the existence of an agreement by promissory estoppel, a cause of action that is beyond the Board's jurisdiction. Respondent's Motion to Dismiss at 6-7.

In *Embarcadero Center, Ltd.*, GSBCA 8526, 89-1 BCA ¶ 21,362 (1988), the General Services Administration Board of Contract Appeals explained the elements of equitable estoppel and the distinction between equitable estoppel and promissory estoppel, and noted that boards of contract appeals do not have jurisdiction over the latter:

> Various authorities have drawn a distinction, for purposes of Claims Court and board jurisdiction, between equitable and promissory estoppel. The latter is used to create a cause of action in quasi-contract and thus is not within board jurisdiction. The purpose of the former is to prevent a party from raising a defense that would otherwise be available and thus is within board jurisdiction. . . . The party seeking to estop the other must establish each of the following four elements:
>
> > (1) the party to be estopped must know the facts, (2) the party to be estopped must intend that its conduct shall be acted upon, or it must so act that the party asserting the estoppel has a right to believe it so intended, (3) the party asserting the estoppel must with good reason be ignorant of the true facts, and (4) the party asserting the estoppel must rely to its detriment on the affirmative conduct of the party to be estopped.

89-1 BCA at 107,681-82; *see also Dawson Construction Co.*, GSBCA 5364, 82-1 BCA ¶ 15,701.

As respondent points out in its motion, the distinction between equitable and promissory estoppel is explained in detail in *Shoshone Indian Tribe v. United States*, 58 Fed. Cl. 542 (2003):

> Promissory estoppel and equitable estoppel may be distinguished by the nature of the representation upon which a party claims to have relied. "In the typical equitable estoppel case, the defendant had represented an *existing or past fact* to the plaintiff, who reasonably and in ignorance of the truth relied upon the representation to his detriment." . . . Because "equitable estoppel necessarily preclude[d] reliance on representations of *present or future intention* . . . the law of promissory estoppel developed."

58 Fed. Cl. at 544 (citations omitted).

Appellant asserts that the Board has subject matter jurisdiction over count III as pled in equitable estoppel, and that respondent is mistaken in its characterization of the allegations contained therein. As in count II, appellant states that the fact at issue is the existence of the parties' agreement to "true-up" the excavation cost in a subsequent modification, not the ultimate amount of the incremental excavation cost. Thus, appellant maintains that the fact which respondent is estopped to deny is an existing fact, not one that will occur in the future. Appellant's Opposition at 4.

Appellant claims respondent repeatedly represented and appellant agreed that the excavation rate utilized by appellant's subcontractor in pricing its underground plumbing work would be a mere "placeholder" to be "trued-up" in supplemental modifications containing the difference between the actual unit rate and the placeholder rate. Complaint ¶ 54. Accordingly, the fact upon which appellant relies in count III and which respondent denies is the existence of the same agreement discussed above with regard to count II which allegedly existed before the issuance of the two modifications. As we found above, whether this agreement existed is an issue of an existing fact. In count III of the complaint, appellant does not seek to create an agreement by promissory estoppel. Rather, the existence of this agreement is asserted by appellant as an existing fact which appellant seeks to estop respondent from denying, and such estoppel would prevent respondent from asserting the defense of accord and satisfaction. Accordingly, this allegation of an existing fact is

sufficient to support appellant's pleading of equitable estoppel, and we deny respondent's motion to dismiss count III of the complaint.[3]

Decision

Respondent's **MOTION TO DISMISS** counts II and III of appellant's complaint is **DENIED**.

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ALLAN H. GOODMAN
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

_____
MARTHA H. DEGRAFF
Board Judge

[3] In denying the motion to dismiss count III, we do not rule that the facts pled by appellant prove equitable estoppel. Appellant must meet its burden of proof in future proceedings.