UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 18, 2007

CBCA 537

MARINE METAL, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Jamison L. Weinbaum of Seyfarth Shaw LLP, Washington, DC, counsel for Appellant.

Eric Colin Crane, Office of Chief Counsel, Department of Transportation, Maritime Administration, Washington, DC, counsel for Respondent.

Before Board Judges **STERN, FENNESSY**, and **SOMERS.**

STERN, Board Judge.

The Department of Transportation, Maritime Administration (MARAD or respondent), moves for summary judgment based on the terms of the contract which it alleges, as a matter of law, place the risks of excess asbestos removal on appellant, Marine Metal, Inc. (Marine Metal or appellant).[1]

[1] In its original motion, respondent claimed that it was also entitled to summary judgment based on appellant's execution of a release waiving its right to the damages it now seeks. Respondent subsequently withdrew that portion of the motion after learning that appellant executed a second release reserving its right to seek such damages.

Background[2]

The contract, in the amount of $1,137,878, required Marine Metal to tow MARAD vessel GENERAL O. DARBY (the DARBY) from the James River Reserve Fleet in Ft. Eustis, Virginia, to appellant's facility in Brownsville, Texas, and dismantle, remediate, and recycle all materials and components on and attached to the DARBY superstructure and hull.

Appellant examined the vessel prior to its contract bid. Since it was prohibited from cutting into the DARBY, it utilized the following inspection method as described by appellant:

> As part of Marine Metal's investigation, Mr. Ramirez [Marine Metal's general manager] attempted to determine if there was any asbestos beneath the metal hallway passage walls of the vessel. Because Marine Metal was prohibited from cutting into the Darby, Mr. Ramirez placed a magnet on a hallway wall and walked all the hallway passages with the magnet. Based on his experience, as well as common inspection practice, Mr. Ramirez assumed that if the magnet stayed in place on the wall, it was likely that there was no other material beneath the walls.

Appeal File, Exhibit 3 at 2. Mr. Ramirez also took material samples from "ceiling panels, pipe insulation, pipe wrap, concrete on decks, floor and wall tile, wall boards, wall canvas, and exhaust insulation." Complaint at 2.

The contract stated:

> This contract is a firm-fixed price commercial item service contract. The Government intends to pay a fixed price amount for the dismantlement, recycling and disposal of the obsolete vessel based on the Contractor's offer for the vessel "AS IS WHERE IS". The Government may provide an estimate of hazardous material/waste quantities if available, but does not guarantee the accuracy of amounts of hazardous material/waste provided in any Government furnished information in the course of bid preparation, proposal submittal, ship checks or award for this disposal project. The Government estimate of hazardous materials/wastes is provided for guidance purposes only as to the

[2] The facts set forth herein are taken from the appeal file and the parties' filings and are solely for the purpose of resolving this motion.

> types and quantities of hazardous materials typically found on vessels of the size, age and type as vessels included in the contract. . . . The Government will also not be responsible for or reimburse the Contractor for any hazardous materials/wastes generated as a result of Contractor remediation, dismantling or recycling processes or procedures. The Government will deliver to the Contractor or its agent the obsolete vessel "AS IS WHERE IS" afloat and free of moorings at the fleet and shall convey custody of the vessel for towing to the Contractor[']s facility for dismantlement. The Contractor agrees to accept delivery and custody of the obsolete vessel "AS IS WHERE IS" for the purpose of dismantlement. The Government will not reimburse the Contractor for actual quantities of hazardous materials remediated, transported and disposed. The Contractor agrees not to make or assert any claim against the Government on account of any agreements, representations or warranties, expressed or implied, with respect to the "AS IS WHERE IS" condition of the obsolete vessel or from drawings, reports, surveys or estimates provided by the Government to the Contractor.

Appeal File, Exhibit 1 at 18.

Marine Metal does not allege that MARAD furnished any estimate of the quantity of asbestos on the DARBY, and there is no evidence that such an estimate was given.

Marine Metal claims that, based on its inspection and prior experience, it anticipated it needed to remediate 800 cubic yards of asbestos on the DARBY. After contract award and movement of the DARBY to Texas, appellant's abatement subcontractor conducted an inspection and estimated that approximately 1500 cubic yards of asbestos would need to be removed. This inspection, which appellant describes as "a more definite estimate of the amount of asbestos that would be subject to abatement and disposal," was also conducted without cutting into the vessel. Complaint at 3. Before conducting the inspection, this abatement subcontractor had estimated that between 750 and 1700 cubic yards of asbestos would need abatement. Appeal File, Exhibit 3 at 9.

Based on these events, appellant alleges that it informed the contracting officer's technical representative (COTR) that it wished to increase its estimated amount and cost of asbestos abatement and disposal. Complaint at 3. Marine Metal alleges that the COTR responded that it should proceed with the work and seek an equitable adjustment at a later time. Complaint at 4.

In its May 31, 2006 "Request for Equitable Adjustment - Asbestos Overage,"

appellant claimed that the location and quantity of asbestos on the DARBY were not "customary" and that it actually removed 3280 cubic yards of asbestos at a cost of $967,600. Marine Metal sought a contract adjustment of $525,100 based on the estimate of 1500 cubic yards of estimated asbestos work at the time of the DARBY's arrival in Texas. Appeal File, Exhibit 22. MARAD denied the request and stated that the contract placed the risk of added costs on Marine Metal. MARAD also stated that the asbestos was found in customary locations and that "the inspections were less comprehensive than they might have been." Appeal File, Exhibit 24.

On October 18, 2006, appellant amended its request for equitable adjustment and claimed entitlement to $731,600 for excess asbestos removal based on its original estimate of $236,000 for asbestos removal.

The sole count for relief in appellant's complaint is that of mutual mistake. Appellant alleges that the parties were mistaken as to the amount of asbestos "they" estimated that Marine Metal would have to abate, that this mistake was a significant underlying factor and had a material effect on the price of the contract, and that the contract did not put the risk of mistake on Marine Metal.

Contentions of the Parties

Respondent claims that it is entitled to summary judgment since as a matter of law, based on the contract terms, appellant's claim is barred. Specifically, MARAD states that this fixed price contract stated that the vessel was in an "as is" condition and that appellant would not be reimbursed for asbestos actually removed.

In its response to MARAD's motion, appellant claims that the agreed-upon contract price was based on its inspection of the vessel and therefore a question of fact exists as to whether the parties were mutually mistaken in their assumption of the reasonableness of the estimate of the asbestos to be abated. Marine Metal concludes:

> Thus, a dispute of fact exists because the parties never would have contracted for as little as they did if they had known that despite their extensive inspection, there was still such a massive amount of undetected asbestos in the metal hallway passage walls of the DARBY superstructure.

Appellant's Brief at 9. Appellant sets forth no additional facts, by affidavit or otherwise, in support of this argument.

Discussion

We are guided by the well-established rules applicable to summary judgment motions. Summary judgment is only 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 judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Any doubt on whether summary judgment 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, more than mere allegations are necessary to defeat a properly supported motion for summary judgment. *Fireman's Insurance Co. of Newark, N.J. v. DuFresne*, 676 F.2d 965 (3rd Cir. 1982); *Tilden Financial Corp. v. Palo Tire Services, Inc.*, 596 F.2d 604 (3rd Cir. 1979); *General Dynamics Corp.*, DOTBCA 1232, 83-1 BCA ¶ 16,386, at 81,459. When the moving party has shown an absence of evidence supporting the non-moving party's case, the burden shifts to the other party to establish that there is a genuine issue of material fact. *Celotex,* 477 U.S. at 324; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986).

MARAD provided evidence that the contract placed the risk of excess asbestos remediation upon Marine Metal. This fixed-price contract, which contained no clause (such as a Differing Site Condition clause) shifting the burden to the Government, instead on its face stated that Marine Metal would not be reimbursed for the actual quantities of asbestos that were remediated. Once MARAD made this showing, the burden shifted to appellant to establish an issue of material fact.

Marine Metal has failed to carry this burden. Appellant has failed to present any evidence that the parties intended that MARAD assume any risk if appellant underestimated the quantity of asbestos that was to be remediated. Both in its complaint and in its opposition to this motion, appellant's sole legal position is that there was a mutual mistake of fact warranting recovery.[3] Appellant claims that there are material facts in dispute as to whether the parties were mutually mistaken as to the reasonableness of the estimated amount of asbestos on the DARBY. Appellant argues this position but fails to present facts in support

[3] It is not for us to speculate as to whether any other legal theory could have been asserted by appellant.

of its theory. Rule 56(e) of the Federal Rules of Civil Procedure requires the non-moving party to go beyond the pleadings and by affidavits or evidence from discovery designate disputed facts that present a genuine issue for trial. *Celotex*, 477 U.S. at 324. For this reason alone, appellant fails to carry its burden and summary judgment is appropriate.[4]

In any event, the facts in the record indicate that appellant's reliance on a mutual mistake theory is misplaced. The elements of mutual mistake, warranting contract reformation, are: (1) the parties to a contract were mistaken in their belief regarding a 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 the 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); *National Presto Industries Inc. v. United States*, 338 F.2d 99, 107-09 (Ct. Cl. 1964).

Referring to Corbin on Contracts, the Federal Circuit has stated,

> Reformation is not a proper remedy for the enforcement of terms to which the defendant never assented; it is a remedy the purpose of which is to make a mistaken writing conform to antecedent expressions on which the parties agreed. These antecedent expressions of agreement may have been such as to constitute a valid informal contract, in which case reformation is merely a step in the enforcement of that contract. The written document was intended to be no more than the integration in writing of the terms already agreed upon. In so far as it differs from those terms it is mistaken and will be corrected. 3 *Corbin on Contracts* § 614 at 723 (1960).

Atlas Corp., 895 F.2d at 750.

The contract made no representation regarding the quantity of asbestos that required remediation. It expressly stated that MARAD would not pay appellant for the actual quantity of asbestos that needed to be remediated. It thereby put on appellant all the risk of the actual quantity of asbestos to be remediated. It is well established that "the language of a contract must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). When the contract

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[4] Appellant also has not claimed by affidavit that it is unable to present facts for lack of opportunity to conduct discovery, or otherwise. *See* Fed. R. Civ. P. 56(f).

language is unambiguous, a court's inquiry ends and the plain contract language controls. *Textron Defense Systems v. Widnall*, 143 F.3d 1465, 1469 (Fed. Cir. 1998). The plain language of this contract was that MARAD would only pay the agreed-upon fixed price, that it would not pay for actual quantities of asbestos (hazardous material) remediation, and that appellant bore the full burden of all costs.

No facts have been brought before us that show that the contract at execution did not embody the understanding and intent of the parties. Under these circumstances reformation would be improper. The risk of any mistake was placed on appellant by the language of the contract.

Decision

Respondent's motion for summary judgment is granted. The appeal is **DENIED**.

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JAMES L. STERN
Board Judge

We concur:

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EILEEN P. FENNESSY
Board Judge

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JERI K. SOMERS
Board Judge