UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR PARTIAL SUMMARY RELIEF
DENIED: November 12, 2008

CBCA 1187

CH2M HILL HANFORD GROUP, INC.,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Kenneth B. Weckstein and Shlomo D. Katz of Brown Rudnick LLP, Washington, DC; and Stanley J. Bensussen of CH2M HILL Hanford Group, Inc., Richland, WA, counsel for Appellant.

Joseph B. Schroeder and Holly Kay Botes, Office of River Protection, Department of Energy, Richland, WA, counsel for Respondent.

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

McCANN, Board Judge.

CH2M HILL Hanford Group, Inc. (CH2M HILL) claims that the Department of Energy (DOE) breached its duty to cooperate under a contract when it failed to request and obtain sufficient funds from Congress to fully finance the project. The parties have cross-moved for summary relief.

Background

CH2M HILL is the prime contractor to the Department of Energy (DOE), Office of River Protection (ORP), under contract no. DE-AC27-99RL14047. Appellant's Statement of Uncontested Facts (AUF) 1. Under the contract CH2M HILL is responsible for managing and executing the contract projects, operations, and other activities as described in section C.3 of the contract. AUF 3. The contract involves cleanup of waste contained in tanks at DOE's Hanford Site in Washington State. AUF 4.

The original mission of the Hanford Site related to the production of weapons-grade nuclear material. The production of weapons materials generated both solid and liquid radioactive waste which was stored in 177 large (50,000 to 1,000,000 gallon) capacity underground single-shell and double-shell tanks. The waste in these tanks must be retrieved, treated, and disposed of in a permanent waste repository. AUF 5.

Section B.3 of the contract, entitled Estimated Cost and Fee, set forth the estimated budget authority for each fiscal year (FY) from FY 2001 through FY 2006 and the fee. AUF 14. Effective with modification A096, dated August 12, 2004, table B-1 in section B.3 of the contract stated the following regarding FYs 2001 through 2006:

Table B-1
Estimated Budget Authority [BA] for Fiscal Years 2001-2006

	FY01	FY02	FY03	FY04	FY05	FY06	TOTAL
New BA Includes Fee	$402.7*	$355*	$410*	$386*	$387*	$388*	$2,328.7*
Fee	$19,769,849	$16,351,536	$16*	$22*	$20*	$14*	$108.1*

* Amounts stated in Millions of dollars.

AUF 15; Appeal File, Exhibit 20 at DOE/ORP 000604.

Section C.2(a)(2) of the contract required CH2M HILL to:

> Complete and maintain an integrated life-cycle baseline which reflects: (a) technical scope of work specified in this Contract, (b) project/program schedules with critical paths identified, and (c) a cost profile based on a

> resource-loaded schedule. . . . [T]he Baseline shall be the basis for budget development, input to risk analysis and prioritization of work.

Appeal File, Exhibit 1 at DOE/ORP 0007-0008.

When ORP submitted its budget request for FY 2006 to DOE headquarters it requested approximately $393 million for tank farm activities. AUF 53. When DOE submitted its budget request for FY 2006 to the President, it requested a total of $382 million ($376 million in budget authority) for tank farm activities. AUF 55. When the President submitted his budget request for FY 2006 to Congress, the President requested $302 million ($296 million in budget authority) for tank farm activities. AUF 57. DOE obligated approximately $319.9 million to the contract for FY 2006. AUF 62; Appellant's Exhibit 3, at 4.

On November 23, 2005, CH2M HILL submitted a request for equitable adjustment for recovery of lost fee opportunity arising from DOE's failure to provide the budget authority set forth in the contract. AUF 64. On October 12, 2006, CH2M HILL filed a certified claim for recovery of the lost fee opportunity arising from DOE's failure to provide the budget authority set forth in the contract. AUF 66. On February 28, 2007, DOE issued a final decision denying CH2M HILL's claim in its entirety. AUF 67.

Discussion

Summary relief is appropriate only if no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The burden is on the moving party to establish "that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Kokosing Construction Co.*, EBCA 439-2-90, 91-1 BCA ¶ 23,508, at 117,869 (1990). A material fact is a fact which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Evidence sufficient to establish the existence of a genuine dispute of a material fact need not be admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 324 (1986). The evidence presented, including all inferences, is construed in favor of the party opposing summary relief. *Automated Services, Inc.*, EBCA 386-3-87, et al., 87-3 BCA ¶ 20,157, at 102,027. Significant doubts are to be resolved in favor of the non-moving party. *Golden West Refining Co.*, EBCA C-9208134, et al., 94-3 BCA ¶ 27,184, at 135,468. Contract interpretation is a question of law, *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984), which may, therefore, be resolved by summary relief if the criteria for summary relief are present.

CH2M HILL is claiming here that the DOE breached its duty under the contract to cooperate with CH2M HILL. It claims that the project was delayed and the contractor's earnings were impacted because the DOE failed to request and secure sufficient funds from Congress to finance the project. Specifically, CH2M HILL claims that CH2M HILL and the DOE, in anticipation of receiving the full funding set forth in Table B-1, agreed in the baseline on how the money was to be spent. In support of its position CH2M HILL relies predominantly upon *S. A. Healy Co. v. United States*, 576 F.2d 299 (Ct. Cl. 1978).

In *Healy* the plaintiff sought a monetary award under a fixed price construction contract for losses incurred in a shutdown of work. The Court held that the shutdown, and thus the damages, were caused, at least in part, by the Government's failure to properly inform the contractor of the status of its request to secure sufficient funds from Congress. (Had the contractor known that funding was not requested, it could have planned accordingly, and reduced or eliminated its damages.) The court indicated that:

> It seems to us not unreasonable to require either that the agency request the amounts it has approved for earnings under the contract, or, alternatively, to disapprove the construction program or otherwise promptly furnish such information about the flow of funds as the contractor will need to plan its own operations. This is simply part and parcel of the implied duty of cooperation and noninterference which is inherent in any contract.

Healy, 576 F.2d at 306 (citations omitted). The Government defended on the ground that the "Funds Available for Earnings" clause placed the entire risk of the unavailability of funds for any reason on the contractor. The Court found that the clause did not place the entire risk of loss on the contractor under the circumstances. The Court went on to state:

> In order not to be misunderstood, we add at this point we are not holding that under this contract the defendant's executive branch was contractually obligated to request from defendant's legislative branch appropriations adequate to fund continued performance. It may well have been free to decide it would request any level it pleased.

Id. at 307. Accordingly, it is clear that *Healy* does not support the proposition that the contract, *per se*, required the DOE to request or obtain the specific funding set forth in table B-1. *Healy* simply holds that the Government has an obligation to keep a contractor informed in some circumstances.

Nevertheless, CH2M HILL asserts that the parties, in anticipation of receiving the full funding level set forth in table B-1, agreed upon a baseline for performing the work. It

contends that, just as in *Healy*, the DOE had an obligation to request full funding so CH2M HILL could perform in accordance with the agreed upon baseline. CH2M HILL contends that without the full funding it was deprived of the ability to earn the fee to which it was entitled under the baseline.

Summary relief is not appropriate here. Material facts are in dispute. Among them are the terms of the baseline and their meaning and effect. As has been pointed out in *CH2M HILL Hanford Group, Inc. v. Department of Energy*, CBCA 708 (Nov. 7, 2008), the parties are very much in disagreement over the meaning of the baseline. Whether the fee is earned on all work or just some work in the baseline is in dispute. It is even unclear as to whether the baseline was approved by the DOE. It certainly is unclear whether the baseline was approved "in anticipation of receiving full funding." Only parts of the baseline have been put into the record. At this point in the proceedings, without a clear understanding of the meaning and effect of the baseline, the granting of summary relief would be inappropriate.

CH2M HILL's arguments here also are unclear. It is not clear whether it is arguing that under *Healy* DOE's funding request to the President is insufficient and a violation of DOE's duty to cooperate even though it was for 97% ($376 million out of $388 million) of the estimated amount set forth in table B-1. It is unclear whether CH2M HILL is arguing that the President's request to Congress of $296 million (71% of $388 million) was insufficient and a violation of DOE's duty to cooperate under the contract. And it is unclear whether CH2M HILL is arguing that regardless of DOE's request and the President's request, DOE had an obligation to fully fund to table B-1 as long as DOE was appropriated funds equal to, or in excess of, the amount shown in table B-1. CH2M HILL's positions are unclear, material facts relating to them are in dispute, and accordingly, summary relief would be inappropriate.

CH2M HILL also alleges that DOE was obligated to cooperate in mitigating the consequences of the funding shortfall. It alleges that DOE could have and should have made other funds available from other sources. Whether this was possible or appropriate is very much in dispute. If CH2M HILL is able to establish that there was an obligation on the part of DOE to request and obtain all of the funds set forth in table B-1, then the facts relating to mitigating the shortfall must be further developed and presented. Material facts are in dispute on this issue.

In considering motions for summary relief, we cannot try issues of fact, i.e., weigh evidence or judge credibility, but only determine whether there are issues to be tried. *Anderson*, 477 U.S. at 249. On the facts presented in the cross-motions, and drawing all

reasonable inferences in favor of the non-moving party, we conclude that neither appellant nor respondent is entitled to judgment as a matter of law.

Decision

Appellant's motion for partial summary relief and respondent's cross-motion for partial summary relief are **DENIED**.

R. ANTHONY McCANN
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

JEROME M. DRUMMOND
Board Judge