

# In the United States Court of Federal Claims

No. 10-178C

(Filed July 23, 2012)

NOT FOR PUBLICATION

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**FLINTCO, INC.,**

Plaintiff,

v.

**THE UNITED STATES,**

Defendant.

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## ORDER

This matter, brought under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-09 (Supp. IV, 2010), concerns Flintco’s attempts to obtain reimbursement from the government for the costs of sales taxes and related expenses incurred by it and its subcontractors. Plaintiff contends that its contract, awarded by the U.S. Department of Justice’s Federal Bureau of Prisons (“the agency”), required the agency to execute a form issued by the state of Louisiana (or to take equivalent action) that would exempt it from sales taxes on materials purchased to perform the contract. Compl. ¶¶ 43-48. Flintco alleges that the agency’s failure to sign this form breached the contract, *id.* ¶¶ 48-52, and violated a duty to cooperate, *id.* ¶¶ 53-61. The plaintiff also maintains that the agency failed to disclose that it knew it “could not or would not execute” the form, *id.* ¶¶ 62-70, and asks that the contract be reformed to add to the price the cost of sales tax and related expenses, due to the agency’s mistaken assumption that it did not have to execute the form in order for Flintco’s purchases of materials to be exempt from sales tax. *Id.* ¶¶ 71-87.

The government has moved for judgment on the pleadings under the Rule 12(c) of the Rules of the United States Court of Federal Claims (“RCFC”) or, in the alternative, for summary judgment under RCFC 56. Def.’s Mot. for J. upon Pleadings (“Def.’s Mot.”) at 1. It argues that the terms of the contract and relevant regulations unambiguously defeat Flintco’s breach claims, *id.* at 15-29, and that plaintiff has not adequately pled a claim based on the mistake doctrines. *Id.* at 29-34. Before this motion was fully briefed and its merits determined, the litigation has been derailed by a discovery dispute. Plaintiff moved to compel the government to produce documents withheld under the assertion of privilege and make several witnesses available for deposition. *See* Pl.’s Mot. to Compel at 1-2. It then moved for discovery under what is now RCFC 56(d) (formerly RCFC 56(f)), in lieu of responding to the merits of the dispositive motion. *See* Pl.’s Rule 56(f) Mot. (“Pl.’s Mot.”) at 1-4. The government responded by moving to stay Flintco’s discovery, arguing it is burdensome and irrelevant to the dispositive motion. Def.’s Combined Mot. for Prot. Order Staying Discovery at 14-22.

After oral argument and supplemental briefing, the discovery-related motions were taken under submission. During their pendency, the government has moved to dismiss the case under RCFC 12(b)(1), on statute of limitations grounds. *See* Def.'s Mot. Dismiss for Lack of Subject Matter Jurisdiction at 1. Following careful consideration of the issues, the Court concludes that plaintiff's RCFC 56(d) motion should be GRANTED-IN-PART, insofar as the government's initial motion may be treated as one for summary judgment under RCFC 56, and DENIED-IN-PART, as it relates to the RCFC 12(c) motion for judgment on the pleadings.

Under a motion for judgment on the pleadings, all well-pleaded facts alleged by the non-movant are assumed true. *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009). Although there is some precedent to the contrary, *see Pac. Emp'rs Ins. Co. v. Clean Harbors Env'tl. Servs., Inc.*, No. 08-C-2180, 2009 WL 3617021, \*1, 3 (N.D. Ill. Oct. 29, 2009), the Court is not persuaded that Rule 56(d), which concerns a party's ability to present facts, has anything to do with motions for judgment on the pleadings. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 310 n.4 (5th Cir. 2002) ("Rule 56(f) has no relevance, however, when a Rule 12(c) motion is not converted to a Rule 56 motion."). The plaintiff argues that "Rule 12(c) motions are routinely converted to Rule 56 [m]otions," and notes that defendant's first dispositive motion was stated in the alternative as one under Rule 56. Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. to Compel at 4. During oral argument, government counsel explained that the alternative summary judgment vehicle was employed in the event that two documents which were referenced in the complaint and included in the appendix to the motion are both necessary to the decision and are found to be outside the pleadings. *See* Def.'s Mot. at 3, 6 & A105-07.

Given the incomplete state of discovery in this case, the Court finds it would not be appropriate to consider matters outside the pleadings in ruling upon defendant's initial motion. The motion in the alternative for summary judgment is **DENIED** without prejudice. Plaintiff shall file its opposition to the motion for judgment on the pleadings **on or by August 16, 2012**. To the extent that the plaintiff can demonstrate that the government's motion regarding any count turns on any facts beyond those which are properly considered to be part of the complaint, this will be a ground for denying the motion as to any such count. Plaintiff's motion under RCFC 56(d) is accordingly **GRANTED-IN-PART** and **DENIED-IN-PART**. The pending discovery motions will be the subject of a separate order.

**IT IS SO ORDERED.**

s/ Victor J. Wolski

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**VICTOR J. WOLSKI**

Judge